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Sup Ct  
**Vol. I**

**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1940**

**No. 373**

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**CHARLOTTE CROSS JUST AND ANNE ELISE  
GRUNER, PETITIONERS,**

**vs.**

**ALMA CHAMBERS, AS EXECUTRIX OF THE ES-  
TATE OF HENRY C. YEISER, JR., AS OWNER OF  
THE AMERICAN YACHT "FRIENDSHIP II"**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED AUGUST 24, 1940.**

**CERTIORARI GRANTED OCTOBER 21, 1940.**



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On September 1, 1936, PETITION AND LIBEL FOR LIMITATION OF LIABILITY, was filed in words and figures following, to-wit:

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION.  
IN ADMIRALTY, 147-M.

IN THE MATTER OF:

THE AMERICAN YACHT "FRIENDSHIP II."

To the United States District Court, Southern District of Florida, Tampa Division. In Admiralty.

The libel and petition of Alma Chambers, as executrix and as ancillary executrix of the last will and testament of Henry C. Yeiser, Jr., late owner of the American Yacht, "Friendship II", in a cause of limitation of liability, civil and maritime, alleges as follows:

First: The libelant is the duly qualified and appointed executrix of the last will and testament of Henry C. Yeiser, Jr., having been appointed by the Probate Judge of Hamilton County, Ohio, and she is also the duly qualified and appointed ancillary executrix of the last will and testament of Henry C. Yeiser, Jr., having been appointed by the County Judge of Dade County, Florida; that as such executrix and ancillary executrix, she has the possession of the said yacht; that Henry C. Yeiser, Jr., died on March 5, 1936, and, at the time of his death, owned the said yacht and owned it at the times herein-after mentioned.

Second: The said yacht is of 93 gross tons; officially numbered 222117; is a cruising houseboat yacht, and was built by Mathis Yacht Building Company, at Camden,

New Jersey, in 1922; length 70 feet; breadth, 17.9 feet; depth, 9.2 feet; draft, 4 feet; powered with two six-cylinder speedway gasoline engines, and is, on information and belief, of the approximate value of \$5,000, and has always been used exclusively as a pleasure yacht on navigable waters.

Third: On February 28, 1936, the said yacht, with its owner, Henry C. Yeiser, Jr., and Charlotte Just and Anne Gruner, and another, in addition to the master and crew, on board, left the Port of Miami, Florida, for a pleasure cruise in Florida waters and returned to the Port of Miami on March 2, 1936. While on the said

2 cruise, the said Charlotte Just and Anne Gruner, imbibed in intoxicating liquors, and the said Charlotte Just and the said Anne Gruner became ill and have since claimed they were made ill through the escape of monoxide or other gas from piping in the said yacht, on account of which they claim they have suffered damages in large sums of money and have made claims against the said yacht, and the owner thereof, and your petitioner for the payment of large sums of money as damages.

Fourth: If monoxide or other gas escaped from the piping in the said yacht, it was not due to the carelessness or negligence of the owner or officers or members of the crew of the said yacht; and injuries caused thereby, if any, were occasioned and incurred by the said Charlotte Just and the said Anne Gruner without the privity or knowledge of the owner of the said yacht or of your petitioner; and, if monoxide or other gas escaped from the piping in the said yacht, and caused injury and damage to the said Charlotte Just and the said Anne Gruner, it was due wholly to an unforeseen and unavoidable accident for which the said yacht, the owner thereof, and your petitioner are not liable.



Fifth: The said Charlotte Just and the said Anne Gruner, while making demands on the owner of the said yacht and on your petitioner for the payment of large sums of money for the damage and injury alleged to have been suffered by them in the manner hereinbefore alleged, have not stated the precise sums of money that they demand as compensation for the damage and injury alleged to have been suffered by them. Neither of the said claimants has yet actually begun suit against the said yacht nor against the owner of the said yacht nor against your petitioner, but Charlotte Cross Just has petitioned the Probate Court of Hamilton County, Ohio, for permission to file a claim of \$150,000.00 against the Estate of Henry C. Yeiser, Jr., and Anne Elise Gruner has petitioned the Probate Court of Hamilton County, Ohio, for permission to file a claim of \$50,000.00 against the Estate of Henry C. Yeiser, Jr.

Sixth: There was and is no freight pending by reason of the said trip in question.

Seventh: Petitioner desires to claim the benefit of the provisions of Sections 183, 184, and 185, Title 46, United State Code Annotated, and the various Acts amendatory thereof and supplemental thereto, and in this  
 3 proceeding, by reason of the facts hereinbefore set forth, to contest the liability of the said yacht, the owner thereof and your petitioner, to any extent whatsoever, for any and all damage and injury done, occasioned or incurred by the said Charlotte Just and the said Anne Gruner by reason of the alleged escape of monoxide or other gas from the piping in the said yacht, and, to that end, the petitioner desires to surrender the said yacht during the pendency of this proceeding to a trustee to be appointed by this Court.

Eighth: Petitioner avers, on information and belief, that there is no lien on the said yacht prior or paramount to any lien which may have accrued by reason of the matters aforesaid; that the said yacht is in the same condition as when she made the trip described in paragraph three hereof, and that she is now of the same market value as then, and has not deteriorated since then.

Ninth: The said yacht is now in the Port of Fort Myers in the Southern District of Florida, Tampa Division, and within the jurisdiction of this Court.

Tenth: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, Petitioner prays that this Court make an order, on such terms as would be just to your petitioner and to all persons having liens, or claims of liens against the said yacht, appointing a trustee to whom the said yacht may be surrendered during the pendency of this proceeding, and appoint a commissioner to receive proofs of claims in accordance with the rules and practice of this Court, and issue a monition to all persons claiming damages by reason of any injury done, occasioned or incurred because of the matters and things hereinbefore alleged, citing them to appear before the said commissioner at or before a time to be named in the said writ, and make proof of their respective claims and to appear and answer upon oath all and singular the premises; and issue its injunction restraining the commencement or prosecution of any and all actions, suits or proceedings of any kind by the said Charlotte Just and the said Anne Gruner, against the said yacht, the owner thereof, and your petitioner, other than in the present proceeding; and that the Court adjudge that the said owner

and your petitioner are not liable for any demand or claim  
 whatsoever in consequence of the said claims of  
 4 the said Charlotte Just and the said Anne Gruner,  
 or, if such liability ever existed, then that the  
 said owner and your petitioner be discharged therefrom  
 by the surrender of the said yacht, and that your peti-  
 tioner may have such other and further relief in the  
 premises as may be just.

KIRLIN, CAMPBELL, HICKOX,  
 KEATING & McGRANN,  
 By VERNON S. JONES,

120 Broadway,  
 New York City.

and  
 LOFTIN, STOKES & CALKINS,  
 By JNO. P. STOKES,

627 Ingraham Building,  
 Miami, Florida.

Proctors for the Libelant and  
 Petitioner.

State of Ohio,  
 County of Hamilton.

Before the undersigned, a Notary Public in and for  
 the State of Ohio and County of Hamilton, personally  
 appeared Alma Chambers, as executrix and as ancillary  
 executrix of the last will and testament of Henry C.  
 Yeiser, Jr., deceased, who, being by me first duly sworn,  
 says: That she is the libelant and petitioner in the above  
 and foregoing libel and petition; that she has read over  
 the same, is familiar with its allegations; and that the  
 allegations therein contained are true, except such mat-  
 ters as are stated on information and belief, and as to  
 these she says that she verily believes the same to be  
 true.

ALMA CHAMBERS.



Sworn to and subscribed before me this August 31st, 1936.

(Notarial Seal)

MARIE A. ZURLAGE,

Notary Public, County of  
Hamilton, State of Ohio.

My commission expires June 22, 1937.

5 On September 1, 1936, EXEMPLIFIED COPY OF LETTERS TESTAMENTARY issued to Alma Chambers, as Executrix of the Last Will and Testament of Henry C. Yeiser, Jr. by the Probate Court of Hamilton County, Ohio, was filed.

On September 1, 1936, the Court entered an ORDER APPOINTING JOHN WOOLSLAIR TRUSTEE to receive the transfer of title to the Yacht Friendship II.

On September 8, 1936, AFFIDAVIT OF PROCTORS for the Libelant certifying that the Yacht Friendship II had been transferred to the Trustee, was filed.

On September 8, 1936, the Court entered an ORDER APPOINTING JOHN WOOLSLAIR as Commissioner, before whom Proof of Claims should be filed.

On September 9, 1936, MONITION was issued to Charlotte Just and Anne Gruner commanding them to present their respective claims to the Commissioner.

On September 28, 1936, the Claimants, Charlotte Just and Anne Gruner filed their ACCEPTANCE OF SERVICE OF THE MONITION.

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On September 28, 1936, the Trustee filed a PETITION FOR AUTHORITY TO SELL THE YACHT FRIENDSHIP II.

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On September 28, 1936, the Trustee filed NOTICE, and PROOF OF SERVICE thereon, of his intention to apply to the Court for an Order authorizing the sale of the Yacht Friendship II.

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6 On September 26, 1936, the Court entered an ORDER AUTHORIZING THE TRUSTEE TO SELL THE YACHT FRIENDSHIP II, which Order was filed September 28, 1936.

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On October 6, 1936, the Trustee filed PROOF OF PUBLICATION of the Notice of said Sale.

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On October 26, 1936, the Libelant and the Claimants, Just and Gruner, filed their JOINT PETITION FOR THE TRANSFER OF THE CAUSE from the Tampa Division to the Miami Division of the District Court; and, on October 26, 1936, the Court entered an Order granting the said Petition.

On October 28, 1936, the Trustee filed his REPORT OF THE SALE OF THE YACHT FRIENDSHIP II, together with his REPORT OF RECEIPTS AND DISBURSEMENTS with supporting vouchers.

---

On October 28, 1936, the Commissioner filed the REPORT OF CLAIMS PRESENTED and OBJECTIONS thereto. The claim of Charlotte Cross Just is in words and figures following, to wit:

7 CLAIM OF CHARLOTTE CROSS JUST.

In the District Court of the United States, for the Southern  
District of Florida, Miami Division.

In the Matter of:

The American Yacht  
"Friendship II".

In Admiralty, No. 3522 Civ.

City of St. Louis,  
State of Missouri.

Charlotte Cross Just, being first duly sworn, says: That on the 1st day of March, 1936, at the invitation of Henry C. Yeiser, Jr., now deceased, I was a guest for a cruise from Miami, Florida, and return, aboard the yacht of the said decedent, "Friendship II", and that the said yacht was on coastal waters somewhere near the vicinity of Miami, Florida; that on the said night of March 1st, 1936, or the early morning of March 2, 1936, while I was asleep in the stateroom which had been

assigned to me for said cruise by the said Henry C. Yeiser, Jr., on the said yacht, I was overcome and rendered unconscious by carbon monoxide or some other noxious gas, which had been permitted to escape from the motors and exhaust pipes of the said yacht, and into the cabin assigned to me as aforesaid, where I was sleeping as aforesaid; that as the direct result thereof, my entire system was poisoned, and I have sustained severe and permanent injuries to my physical and nervous system and health; that at said time the said yacht was unseaworthy, and the exhaust pipes in the said yacht had holes in them and were otherwise in such a defective condition, as to permit carbon monoxide or other noxious gas to escape therefrom and into the stateroom which had been assigned to me as aforesaid, and in which I was sleeping as aforesaid.

That as the direct result thereof, since the date of the injuries I have been, and still am, under the constant care and attention of physicians and nurses, and will be compelled to remain under their care in the future for an undetermined period; and I have been forced

8 to incur, and for an undetermined period of time in the future will incur, great expense for hospital, medical, surgical, and nursing attention, and for medicines, in and about attempting to cure myself of the said injuries; that the said injuries are permanent and are the direct results of the said negligence of the said Henry C. Yeiser, Jr., in assigning to me the said stateroom aboard his said yacht, when he knew, or should have known, that the said yacht was unseaworthy, and that said stateroom was unsafe, and that said motors and exhaust pipes were defective and in such condition that carbon monoxide gas or other noxious gas was escaping or would likely escape therefrom as aforesaid, into the stateroom, which he had assigned to me, and in which I was sleeping as aforesaid, and in permitting said gas to escape into said stateroom, as aforesaid.



That I am entitled to maintain an action to recover damages for the said injuries and losses thus occasioned, and hereby claim One Hundred and Fifty Thousand Dollars, (\$150,000.00) as the amount of such injuries, damages, and losses, no part of which has been paid to me.

CHARLOTTE CROSS JUST.

Sworn to and subscribed before me, this October 20, 1936.

(N. P. Seal)

E. E. CARPENTIER,

Notary Public, State of Missouri.

My commission expires: August 8, 1940.

11/bb/1/6.

10/17/36.

9

In Admiralty, No. 3522 Civ.

(Title Omitted.)

The CLAIM OF ANNE ELISE GRUNER is in words and figures following, to wit:

Anne Elise Gruner, being first duly sworn, says: That on the 1st day of March, 1936, at the invitation of Henry C. Yeiser, Jr., now deceased, I was a guest for a cruise from Miami, Florida, and return, aboard the yacht of the said decedent, "Friendship II", and that the said yacht was on coastal waters somewhere near the vicinity of Miami, Florida; that on the said night of March 1st, 1936, or the early morning of March 2, 1936, while I was asleep in the stateroom which had been assigned to me for said cruise by the said Henry C. Yeiser, Jr., on the said yacht, I was overcome and rendered unconscious by carbon monoxide or some other noxious gas, which had been permitted to escape from the motors and ex-

haust pipes of the said yacht, and into the cabin assigned to me as aforesaid, where I was sleeping as aforesaid; that as the direct result thereof, my entire system was poisoned, and I have sustained severe and permanent injuries to my physical and nervous system and health; that at said time the said yacht was unseaworthy, and the exhaust pipes in the said yacht had holes in them and were otherwise in such a defective condition, as to permit carbon monoxide or other noxious gas to escape therefrom and into the stateroom which had been assigned to me as aforesaid, and in which I was sleeping, as aforesaid.

That as the direct result thereof, since the date of the injuries I have been, and still am, under care and attention of physicians, and will be compelled to remain under their care in the future for an undetermined  
10      period; and I have been forced to incur, and for an undetermined period of time in the future will incur, great expense for hospital, medical, surgical, and nursing attention, and for medicines, in and about attempting to cure myself of the said injuries; that the said injuries are permanent and are the direct results of the said negligence of the said Henry C. Yeiser, Jr., in assigning to me the said stateroom aboard his said yacht, when he knew, or should have known, that the said yacht was unseaworthy, and that said stateroom was unsafe, and that said motors and exhaust pipes were defective and in such condition that carbon monoxide gas or other noxious gas was escaping or would likely escape therefrom as aforesaid, into the stateroom, which he had assigned to me, and in which I was sleeping as aforesaid, and in permitting said gas to escape into said stateroom as aforesaid.

That I am entitled to maintain an action to recover damages for the said injuries and losses thus occasioned.

and hereby claim Fifty Thousand Dollars, (\$50,000.00), as the amount of such injuries, damages, and losses, no part of which has been paid to me.

ANNE ELISE GRUNER.

Sworn to and subscribed before me, this October 20th, 1936.

(N. P. Seal)

W. E. WALKER,

Notary Public State of Missouri.

My commission expires July 22, 1938.

11/bb/1/6.

10.17/36.

The OBJECTION TO THE CLAIM OF ANNE ELISE GRUNER is in words and figures following, to wit:

11

In Admiralty, No. 3522-Civ.

(Title Omitted.)

To: Evans, Mershon & Sawyer, M. L. Mershon, E. O. Mehrtens, Proctors for Anne Elise Gruner:

Please take notice That the Petitioner herein objects to allowance of the claim filed in this cause by, or on behalf of, Anne Elise Gruner, and prays that the said claim may be disallowed and excluded unless established by further legal proof upon notice to the Proctors for the Petitioner and authorized in the manner provided by law.

Dated at Miami, Florida, this October 26, 1936.

Yours, etc.,

KIRLIN, CAMPBELL, HICKOX,

KEATING & McGRANN,

and

LOFTIN, STOKES & CALKINS,

By JNO. P. STOKES,

Proctors for the Petitioner.

The OBJECTION TO THE CLAIM OF CHARLOTTE CROSS JUST is in words and figures following, to wit:

12 In Admiralty, No. 3522-Civ.

(Title Omitted.)

To: Evans, Mershon & Sawyer, M. L. Mershon, W. O. Mehrtens, Proctors for Charlotte Cross Just:

Please take notice That the Petitioner herein objects to allowance of the claim filed in this cause by, or on behalf of, Charlotte Cross Just, and prays that the said claim may be disallowed and excluded unless established by further legal proof upon notice to the Proctors for the Petitioner and authorized in the manner provided by law.

Dated at Miami, Florida, this October 26, 1936,

Yours, etc.,

KIRLIN, CAMPBELL, HICKOX,  
KEATING & McGRANN,  
and

LOFTIN, STOKES & CALKINS,  
By JNO. P. STOKES,  
Proctors for the Petitioner

The COMMISSIONER'S LIST OF CLAIMS PRESENTED TO HIM, is in words and figures following, to wit:

13 In Admiralty, No. 147-M.

(Title Omitted.)

To the United States District Court for the Southern District of Florida:

By order entered herein on September 5, 1936, the undersigned was appointed Commissioner to receive claims



on or before October 26, 1936. I hereby report that the following claims have been presented to me and are annexed hereto:

1. Charlotte Cross Just, \$150,000.00.
2. Anne Elise Gruner, \$50,000.00.

There was also filed with me, on behalf of Alma Chambers, as domiciliary and as ancillary executrix of the Last Will and Testament of Henry C. Yeiser, Jr., objections to each of the above mentioned claims.

No other claims were filed. (J. W.)

Accompanying this report are the claims filed with me and the objections thereto also filed with me.

Dated at Fort Myers, Florida, October 27, 1936.

Respectfully submitted,  
JOHN WOOLSLAIR,  
Commissioner.

---

On October 28, 1936, the Trustee filed his Affidavit as to the Services Performed by him and his personal expenses.

On October 15, 1936, the PETITION OF CHARLOTTE JUST AND ANNE GRUNER FOR LEAVE TO INSPECT THE SAID YACHT AND TO IMPOUND THE EXHAUST PIPES, was filed in words and figures following, to wit:

14

## PETITION.

In Admiralty, 147-M-Adm.

(Title Omitted.)

Come now Charlotte Just and Anne Gruner, severally, by their undersigned proctors, and respectfully show.

1. This is a proceeding for limitation of liability instituted herein upon the libel and petition of Alma Chambers, as Executrix and as Ancillary Executrix of the Last Will and Testament of Henry C. Yeiser, Jr., late owner of the American Yacht "Friendship II". That as more fully appears from said libel and petition of said Alma Chambers, as Executrix, the said proceeding seeks exoneration from or limitation of liability unto the said Charlotte Just and Anne Gruner, for injuries claimed to have been received by them through the escape of carbon monoxide or other gases from the piping in said Yacht during the lifetime of said owner thereof, Henry C. Yeiser, Jr.; and it is further alleged in said petition for limitation and exoneration, as aforesaid, that if said monoxide or other gas escaped from the piping in said Yacht it was not due to the carelessness or negligence of the owner or officers or members of the crew of said Yacht, but was due wholly to unforeseen and unavoidable accident, for which the said Yacht, the owner thereof, and the petitioning Executrix are not liable; and that if said gas escaped, the injuries to these petitioners, if caused thereby, were occasioned and incurred by these petitioners without

privity or knowledge of the owner of said Yacht or of said petitioning Executrix.

2. That the petitioning Executrix offered to surrender and did surrender the said Yacht "Friendship II" unto John Woolslair, Esquire, Trustee appointed by this Court; and thereafter, upon petition of said John Woolslair, as Trustee, this Court herein entered an order directing the sale of said Yacht "Friendship II",  
15 her engines, tackle, apparel and furniture, and a Chris-Craft motor launch, to be sold on board said Yacht "Friendship II" at the Port of Fort Myers, at public auction, after giving not less than ten days' notice of such sale by publication, as more fully appears from said order dated September 26, 1936, of record in this cause.

3. That these petitioners-claimants, Charlotte Just and Anne Gruner, have been allowed by order of Court herein until October 26, 1936, within which to file their claim and answer to said petition of said Executrix, and they will within said time file herein their said answer to said petition and their claim setting out their said claim from which said Executrix seeks exoneration and against which said Executrix seeks said limitation of liability. That these petitioners claim that while they were sleeping in the large stateroom at the stern of said Yacht, on the night of March 1, or the morning of March 2, they were severally overcome by carbon monoxide or other poisonous gas escaping from the motors' exhaust pipe or other piping and equipment of said Yacht. That these claimants were guests of said Henry C. Yeiser, Jr., upon said Yacht and were assigned to said sleeping quarters by him. That said sleeping quarters of these claimants were immediately over the exhaust pipes which ran from the motors of said Yacht to the stern of said Yacht, and there were certain vents and openings from the bilge of said Yacht in which said exhaust pipes were located di-

rectly into the said sleeping quarters of these claimants, all of which the said Henry C. Yeiser, Jr., well knew at the time he assigned said sleeping quarters to these claimants. That at and before the time these  
 16 claimants were injured, as aforesaid, one or more of such exhaust pipes was defective and unsafe, in that it or they permitted gases from the combustion in said motors to escape from said exhaust pipes into the bilge of said Yacht and into the stateroom where these claimants were sleeping, as aforesaid.

4. That the sale of said Yacht was advertised by said Trustee to be held on October 3, 1936, at 1:00 o'clock P. M.; that the undersigned proctors for said Charlotte Just and Anne Gruner procured permission from said Trustee to make an inspection of the said Yacht and went aboard said Yacht about 11:00 o'clock A. M., on October 8, for that purpose, and made a partial inspection, that is to say, inspected the staterooms, engine room and other quarters upon said Yacht, but when they announced that they desired to inspect the said exhaust pipes, the Captain in charge of said Yacht (who is Captain Fred Roberts, the same captain who was in charge of said Yacht at the time these claimants received their injuries, as aforesaid) stopped them and refused to permit them to do so, pending the arrival of the Trustee to make said sale. That upon the arrival of said Trustee at said Yacht, about 12:40 P. M., said Trustee permitted said proctors for these claimants to continue the said inspection. That a partial inspection only was had and made, for a period of about twenty minutes up to the time of said sale at 1:00 o'clock, that is to say, an inspection was made of only a part of the exhaust pipe on the port side of said Yacht, and no opportunity was afforded for inspection of that entire exhaust pipe nor any part of the exhaust pipe in the bilge of said Yacht on the starboard side.



5. That the bidding at said sale started promptly at one o'clock, and John P. Stokes, Jr., who is an associate of the firm of Loftin, Stokes & Calkins, proctors for the petitioning Executrix, bid in and purchased said Yacht, in the name of "John P. Stokes, Jr., Agent."

17 That immediately after said sale, said John P. Stokes, Jr., flatly refused to permit said proctors for these claimants and their surveyor to inspect or see the said exhaust pipes, or any of them.

6. That said exhaust pipes consist of several lengths joined together with flanges. That as a result of such partial inspection, the said proctors and the surveyor for these claimants found that one length of said exhaust pipe on the port side was surrounded by rubber or some other composition, which was strapped around said exhaust pipe and held in shape by metal strips to prevent leakage therefrom, which patch appeared to be of recent origin. That the said defective length of exhaust pipe is located in the bilge of said Yacht, only a few feet from the stateroom in which these claimants were sleeping and from the vants which opened from said bilge into said stateroom.

That an inspection of each of said exhaust pipes in their entirety, and of their condition and the condition of their several joints and connections, is necessary and material to the making out of these claimants' case and claim and is material to the proper determination of the issues and questions in dispute in this cause. That the petitioner who is seeking limitation of, and exoneration from, liability is, as aforesaid, seeking to prevent these claimants from ascertaining what evidence is in existence and will be available to them in proving the case which they must make out, charge and prove, and to meet the issues of fact presented by petitioner's said petition for limitation and exoneration.

7. That immediately after said sale, the Captain of said yacht announced that he was going to move the said yacht and take it to a dry dock at once, and that these claimants believe, and here show, that upon confirmation of said sale said yacht "Friendship II" will be moved and said exhaust pipes, and particularly the defective section thereof above mentioned, will either be removed from said yacht or disposed of, or taken out of the jurisdiction of the Court, or otherwise made unavailable to these claimants and to the Court as evidence in the trial of said cause and the issues therein.

18 That said defective link of exhaust pipe upon the port side, which is strapped on the outside, as aforesaid, should be impounded as a material exhibit herein, under the order of the Court, and such other portions of each and both of said exhaust pipes as may be found upon such inspection to be defective should likewise be impounded as material exhibits under the order of the Court, to be produced subject to the Court's order.

Wherefore, the Premises Considered, These Claimants Pray:

1. That confirmation of said sale be stayed until the further order of the Court, after notice to these claimants.

2. That pending confirmation of said sale and while said yacht is still in the custody and jurisdiction of this Court, these claimants, their proctors and representatives may be permitted to inspect the said exhaust pipes and the condition thereof, under such supervision of this Court or in conjunction with an inspector to be appointed by the Court, as the Court may direct, and that any changes in the condition of said yacht, or of said exhaust pipes, may be restrained until the completion of said inspection.

3. That the Court may, upon such terms and conditions as it may deem advisable, order the said defective link of exhaust pipe, with the said strap on the outside thereof, on the port side of said yacht, to be identified and properly marked, and delivered to the Clerk of this Court, to be held and produced at the trial, and subject to the inspection of the parties to this cause; and that any other portions of said exhaust pipes which may be found to be in a defective condition may likewise be so impounded.

EVANS, MERSHON & SAWYER,

M. L. MERSHON,

W. O. MEHRTENS,

Proctors for Claimants, Charlotte Just and Anne Gruner.

19 State of Florida,  
County of Dade.

Before me, the undersigned authority, personally appeared M. L. Mershon and W. O. Mehrtens, who, being first duly sworn, say that they are the proctors for claimants, Charlotte Just and Anne Gruner, on whose behalf the foregoing petition is filed; that the matters set forth in said petition are true, except those which are set forth upon information and belief, and as to those, affiants severally are informed and believe, respectively, that they are true.

M. L. MERSHON,

W. O. MEHRTENS.

Sworn to and subscribed before me, this October 9, 1936.

(N. P. Seal)

BESS ENNIS,

Notary Public, State of Florida  
at Large.

My commission expires: 12/4/36.

On October 9, 1936, an Order was entered, and filed on October 15, 1936, directing the Trustee and the purchaser of the said Yacht to desist from interfering with the structural condition of the said Yacht with reference to the exhaust pipes, which Order is in words and figures following, to wit:

20

## ORDER.

In Admiralty, No. 147-M.

(Title Omitted.)

This cause came on to be heard on the Petition of Charlotte Just and Anne Gruner, claimants, this day filed before the Court, upon informal notice to Counsel for Alma Chambers, as Executrix and as Ancillary Executrix of the last Will and Testament of Henry C. Yeiser, Jr., from which Petition it appears there is no effort on the part of the Petitioners to upset the sale, but only to obtain inspection of parts of the Yacht as set out in said Petition, and to impound evidence; and the Counsel for the said Executrix having objected to said Petition and to the entry of this Order, on grounds to be set forth in written objections to be filed in this cause as of the date of this order; and the Court being advised in the premises:

It Is Ordered that the said Petition be further brought on to be heard at 12 o'clock noon, Wednesday, October 14, 1936, and that notice of said hearing be given to both the Trustee and the Purchaser of the said Yacht; and that nothing herein shall be construed as a disapproval of the sale heretofore made as reported in said Petition, but that, pending said hearing on October 14, 1936, aforesaid, the Trustee and the Purchaser of said Yacht shall desist from interfering with the structural condition of



the said Yacht with reference to the exhaust pipes and all connections.

A copy of this Order and the said Petition shall be forthwith served on the Trustee and on the Purchaser of the said Yacht.

Ordered and done at Miami, Florida, this October 9, 1936.

JOHN W. HOLLAND,  
District Judge.

21

## ORDER.

In Admiralty, No. 147-M.

(Title Omitted.)

On October 15, 1936 there was entered and filed an ORDER PROVIDING FOR THE INSPECTION OF THE SAID YACHT AND IMPOUNDING THE EXHAUST PIPES, which Order is in words and figures following, to wit:

This cause came on to be heard upon the application of counsel for the claimants, Charlotte Just and Anne Bruner, for authority to inspect the exhaust pipes and connections on board the American yacht "Friendship II", and to impound the same, or certain parts thereof; and said counsel for claimants having agreed in Open Court with the purchaser at the Trustee's sale, S. M. Becker, Esq., for such inspection by claimants, their counsel and representatives, on Tuesday, October 13, 1936, at Fort Myers, Florida, where said yacht now lies, and for then and there identifying, marking, and later impounding

such parts of the said exhaust pipes and connections as they may desire, all at the expense of said claimants as hereinafter provided; it is thereupon

Ordered, Adjudged and Decreed that the sale of the American yacht "Friendship II" made on October 8, 1936, by John Woolslair, as Trustee appointed by this Court, be, and the same is hereby in all respects, confirmed, reserving the right to said claimants as aforesaid to inspect and impound said exhaust pipes, connections and parts thereof as herein provided.

22 It is Further Ordered that the inspection above mentioned shall be made on October 13, 1936, and that such parts be then identified and marked, and that thereafter such exhaust pipes, or connections, or parts thereof as shall have been identified or marked may be withdrawn from said yacht by counsel for said claimants and impounded in this Court, in which event replacements thereof shall be made, all by and at the costs of said claimants without expense or loss to the said purchaser, S. M. Becker, or his assigns, withdrawal and replacement to be made on or before the expiration of three days after the date that the said purchaser, S. M. Becker, shall notify Evans, Mershon & Sawyer, Miami, Florida, counsel for the said claimants, of the presence of said yacht in Miami, Florida, or its immediate vicinity, it being understood that said yacht shall be brought to Miami or vicinity by said purchaser as aforesaid within thirty days (weather permitting), and that said pipes and connections or parts thereof identified and marked by claimants as aforesaid shall not be changed, destroyed, or removed by said purchaser until after the lapse of said three days after said notice to said claimants of arrival in Miami or vicinity as aforesaid, except that if any change occur without the purchaser's affirmative act

such part or parts shall be preserved with identity thereof to comply with the otherwise stated terms of this order.

Done and Ordered at Miami, Florida, this 15th day of October, 1936.

JOHN W. HOLLAND,  
United States District Judge.

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On October 28, 1936, there was entered and filed an ORDER APPROVING THE TRUSTEE'S REPORT OF THE SALE OF THE SAID YACHT AND ORDERING CERTAIN DISBURSEMENTS, which order is in words and figures, following, to wit:

23

## ORDER.

In Admiralty, No. 147-M.

(Title Omitted.)

This cause came on to be heard upon the report of John Woolslair, Fort Myers, Florida, as Trustee, appointed herein by order of the Court, dated September 1, 1936, and it appearing that the Proctors for the Claimants had due notice of the said report, after argument of the Proctors, the Court being fully advised in the premises.

It Is Considered, Ordered and Adjudged that the said report be, and the same is, hereby approved; and that the sale of the said yacht "Friendship II", her engines, tackle, apparel and furniture, and a Chris-Craft Motor Launch, by the said Trustee to Sherburn M. Becker be, and the same is, hereby confirmed, and that the said Trustee is

hereby authorized, empowered and directed to pay out of the proceeds of the said sale, namely, Seventy-one Hundred Dollars (\$7100.00), the following items of expense properly incurred by him as such Trustee, namely:

News-Press Publishing Company, Fort Myers, Florida, for publication of notice of sale for three times in the Fort Myers-News Press .....	\$ 2.25
Fort Myers Insurance Agency, Inc., Fort Myers, Florida, full marine insurance in the sum of \$10,000, the premium covering the period from September 4, 1936 to October 8, 1936, inclusive	126.50
Heitman-Evans Company, Fort Myers, Florida, for paint to preserve the decks of the yacht Friendship II .....	32.60
Franklin Hardware Co., Inc., Fort Myers, Florida, 2 chamois skins to keep parts of the said yacht polished .....	4.25
Gulf Oil Corporation, Fort Myers, Florida, to gasoline to operate the motor so as to keep the batteries charged on the said yacht, etc. ....	23.53
Captain Fred E. Roberts, salary due as Captain of Yacht Friendship II at \$175.00 per month from September 2, 1936 to October 8, 1936, both inclusive .....	215.81
Chief Engineer C. M. Blount, salary due as Chief Engineer of Yacht Friendship II at \$140.00 per month from September 2, 1936 to October 8, 1936, both inclusive .....	172.69
Pat. Morgan, Fort Myers, Florida, for services aboard Yacht Friendship II on the day of sale .	5.00
United States Collector of Customs at New York City for recording bill of sale of Yacht Friendship II and Chris-Craft Motor Launch, from Alma Chambers, as domiciliary and as ancillary executrix to John Woolslair, as Trustee	2.20



United States Collector of Customs at Cincinnati, Ohio, to cost of certificate of abstract of title to enable John Woolslair, as Trustee, to trans- fer the Yacht Friendship II, her engines, etc. and the Chris-Craft Motor Launch to Sher- burn M. Becker .....	1.06
To Deputy Clerk of the United States District Court at Tampa, Florida, for a certified copy of the Order authorizing John Woolslair, as Trustee, to sell the said yacht Friendship II, her engines, etc., and the said Chris-Craft Motor Launch, which was necessary to procure to accompany the bill of sale by the Trustee to Sherburn M. Becker .....	1.40
Total .....	\$587.29

And the said Trustee having filed before this Court an itemized statement of the services performed by him, as such Trustee, verified by his oath, the compensation of the said John Woolslair, as such Trustee, be, and the same is, hereby fixed at \$377.50, which shall include all expenses incurred by him, as such Trustee, other than the specific items hereinbefore specifically authorized to be paid out of the proceeds of the said sale; and the said Trustee is hereby authorized, empowered and directed to deduct out of the proceeds of the said sale the amount of compensation hereinbefore fixed; and that the said Trustee do pay to Edwin R. Williams, as Clerk of this Court, the net balance of the said Seventy-one Hundred Dollars (\$7100.00) remaining in the hands of the said Trustee after making all of the disbursements hereinbefore expressly authorized, and upon receiving the receipt of the said Edwin R. Williams, as such Clerk, for the correct net balance of the funds in the hands of the said Trustee, the said Trustee shall thereupon be relieved of all responsibility for

the moneys delivered by him to the said Edwin R. Williams, as such Clerk; and that said Trustee do forthwith, after having complied with all of the terms of this decree, file in the office of the Clerk of this Court a final report, showing compliance by him with all of the terms of this decree; whereupon the said Trustee shall be considered to have performed all of his duties as such Trustee and be discharged from further responsibility.

Done and Ordered at Miami, Florida, this October 28th, A. D. 1936.

JOHN W. HOLLAND,  
District Judge.

On October 23, 1936, Charlotte Cross Just filed her ANSWER TO THE LIBEL, in words and figures, following, to wit:

26 ANSWER OF CHARLOTTE CROSS JUST.

In Admiralty No. 147-M.

(Title Omitted.)

The answer of Charlotte Cross Just, claimant and respondent herein, to the libel and petition of Alma Chambers, as executrix and as ancillary executrix of the last will and testament of Henry C. Yeiser, Jr., late owner of the American Yacht, "Friendship II," in an alleged cause of limitation of liability, civil and maritime, alleges as follows:

First: Respondent is without knowledge or information as to the allegations in the first numbered article of the

said libel and petition as to the qualifications of libelant as executrix and ancillary executrix under the last will of Henry C. Yeiser, Jr., or as to her having possession of said yacht. Respondent admits that Henry C. Yeiser, Jr., died on or about March 5, 1936, and that he owned the said yacht at the time mentioned in the petition and this answer.

Second: Respondent is without knowledge or information as to the allegations in the second numbered article of the said libel and petition as to the size, equipment, value, and use of the said yacht.

Third: Respondent admits that on February 28, 1936, said yacht, with its owner, Henry C. Yeiser, Jr., respondent, and others, left the port of Miami, Florida, for a pleasure cruise in Florida waters, and returned to the said port on March 2, 1936. Respondent denies that she imbibed in intoxicating liquors, but admits that during the said cruise she became ill and at that time, and all times since, has claimed that she was made ill through the escape of carbon monoxide or other noxious gas escaping from the motors, exhaust pipes, and connections thereto

in the said yacht; and that as the result thereof,  
 27 she has made claims against the said Henry C. Yeiser, Jr., and his estate, for compensation for the said injuries and damages suffered by her as herein averred.

Fourth: Respondent avers that carbon monoxide or other noxious gases did escape from the piping motors and connections thereto in the said yacht, as hereinafter set forth, and that the same was due to the carelessness and negligence of the owner, officers, and members of the crew of the said yacht; respondent denies that the damages and injuries suffered by her were occasioned and incurred without the privity or knowledge of the said

Henry C. Yeiser, Jr., and avers that the said injuries caused her thereby, were occasioned and incurred with the privity and knowledge of the said owner of said yacht; and respondent expressly denies that the injury and damage to claimant was due to an unforeseen and unavoidable accident, but to the contrary, says that the said injuries could have been foreseen and avoided by the exercise of reasonable care on the part of Henry C. Yeiser, Jr., and that said injuries were due to the negligence and carelessness herein set forth.

Fifth: Respondent admits the allegations of the article numbered five in the said libel and petition, in that she has petitioned the Probate Court of Hamilton County, Ohio, for permission to file a claim against the Estate of Henry C. Yeiser, Jr.

Sixth: Respondent is without knowledge as to the allegations contained in the article numbered six of the said petition as to freight pending by reason of the said trip.

Seventh: Respondent avers that the petitioner is not entitled to the benefit of the limitation of liability provided for in Sections 4281, 4282, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States, being Sections 183, 184 and 185 of Title 46 United States Code Annotated, and the various Acts amendatory thereof and supplemental thereto, or otherwise. And answering further, respondent avers that the petitioner is not entitled to exemption from liability for the damages and injuries done, occasioned, or incurred by respondent, by reason of the escape of carbon monoxide or other noxious gas as hereinafter set forth.

Eighth: Respondent is without knowledge as to the existence of any liens on the said yacht prior or paramount to the lien of the respondent that has accrued by



reason of the damages and injuries aforesaid. Answering further, respondent is without knowledge as to the condition of the yacht, her present market value, and whether or not the said yacht has deteriorated in value since the said trip, as averred in Article "Eight" of said petition.

Ninth: Respondent admits that the said yacht, at the time of the filing of the petition and libel was in the port of Fort Myers, in the Southern District of Florida.

Tenth: Further answering the libel and petition herein, respondent avers that on the 1st day of March, 1936, at the invitation of Henry C. Yeiser, Jr., now deceased, she was a guest for a cruise from Miami, Florida, and return, aboard the yacht, "Friendship II," and that the said yacht was on coastal waters somewhere near the vicinity of Miami, Florida; that on the said night of March 1, 1936, or the early morning of March 2, 1936, while she was asleep in the stateroom which had been assigned to her for the said cruise, by the said Henry C. Yeiser, Jr., on the said yacht, which stateroom was on the bottom deck of said yacht, at the stern thereof, and directly above the exhaust pipes supposed to discharge the gases from the motors of the said yacht, this respondent was overcome and rendered unconscious by carbon monoxide, or some other noxious gas, which had been permitted to escape from the motors and exhaust pipes of the said yacht and into the stateroom assigned to her as aforesaid, and

29. where she was sleeping, as aforesaid; that as the direct result thereof, her entire system was poisoned and she has sustained severe and permanent injuries to her physical and nervous system and health; that at the said time the said yacht was unseaworthy, and the exhaust pipes in the said yacht had holes in them, and were otherwise in such a defective condition as to permit carbon monoxide or other noxious gas to

escape therefrom and into the stateroom which had been assigned to her as aforesaid, and in which she was sleeping as aforesaid.

That as the direct result thereof, since the date of the said injuries, she has been and still is, under the constant care and attention of physicians and nurses, and will be compelled to remain under their care in the future for an undetermined period; that she has been forced to incur and for an undetermined period of time in the future will incur great expense for hospital, medical, surgical, and nursing attention; and for medicines in and about attempting to cure herself of the said injuries; that the said injuries are permanent and are the direct and proximate results of the said negligence of the said Henry C. Yeiser, Jr., in assigning to her the said stateroom aboard his said yacht when he knew, or should have known, that the said yacht was unseaworthy, and that said stateroom was unsafe, and that said motors and exhaust pipes were defective and in such condition that carbon monoxide gas or other noxious gas was escaping or would likely escape therefrom, as aforesaid, into the stateroom, which he had assigned to her and in which she was sleeping as aforesaid, and in permitting said gas to escape into said stateroom as aforesaid.

Wherefore, respondent prays that the Court will enter its decree herein declaring the petitioner to be liable on account of respondent's injuries and damages suffered as aforesaid; and denying the right of the petitioner herein to a limitation of the said liability; and that complete relief be granted to respondent by the entry of a judgment against the petitioner for the full amount of respondent's said damages and costs; that the Court determine respondent's proper share of the fund now in Court and

30 distribute the same to her to be applied on the said judgment, and enter a personal judgment herein against the petitioner for any and all deficiencies thereafter existing, and that respondent may have such other and further relief in the premises, as in law and justice she may be entitled to receive.

EVANS, MERSHON &  
SAWYER,

M. L. MERSHON,  
W. O. MEHRTENS,

Proctors for Charlotte Cross  
Just.

31 State of Florida,  
County of Dade.

Before me this day personally appeared, W. O. Mehrtens, who being first duly sworn, says that he is an associate of the firm of Evans, Mershon & Sawyer, Proctors in Admiralty, Miami, Florida, and of counsel for the above described claimant; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the sources of his knowledge or information are communications received from the claimant and her agents, and an examination of the vessel and the papers relating to the matter in suit; that the reason why this verification is not made by the claimant, is that the said claimant is not a resident of the State of Florida, and is not within this district.

W. O. MEHRTENS.

Sworn to and subscribed before me, this 23rd day of October, 1936.

(N. P. Seal)

WM. E. DUNWODY, JR.,  
Notary Public, State of Florida  
at Large.

My Commission Expires 9/29/39.

On October 23, 1936, Anne Elise Gruner filed her Answer to the Libel, in words and figures following, to-wit:

32      ANSWER OF ANNE ELISE GRUNER.

In Admiralty No. 147-M.

(Title Omitted.)

The answer of Anne Elise Gruner, claimant and respondent herein, to the libel and petition of Alma Chambers, as executrix and as ancillary executrix of the last will and testament of Henry C. Yeiser, Jr., late owner of the American Yacht, "Friendship II," in an alleged cause of limitation of liability, civil and maritime, alleges as follows:

First: Respondent is without knowledge or information as to the allegations in the first numbered article of the said libel and petition as to the qualifications of libelant as executrix and ancillary executrix under the last will of Henry C. Yeiser, Jr., or as to her having possession of said yacht. Respondent admits that Henry C. Yeiser, Jr., died on or about March 5, 1936, and that he owned the said yacht at the time mentioned in the petition and this answer.

Second: Respondent is without knowledge or information as to the allegations in the second numbered article of the said libel and petition as to the size, equipment, value, and use of the said yacht.

Third: Respondent admits that on February 28, 1936, said yacht, with its owner, Henry C. Yeiser, Jr., respondent, and others, left the port of Miami, Florida, for a pleasure cruise in Florida waters, and returned to the said port on March 2, 1936. Respondent denies that she im-



bibed in intoxicating liquors, but admits that during the said cruise she became ill and at that time, and all times since, has claimed that she was made ill through the escape of carbon monoxide or other noxious gas escaping from the motors, exhaust pipes, and connections thereto in

the said yacht; and that as the result thereof,  
 33 she has made claims against the said Henry C. Yeiser, Jr., and his estate, for compensation for the said injuries and damages suffered by her as herein averred.

Fourth: Respondent avers that carbon monoxide or other noxious gases did escape from the piping motors and connections thereto in the said yacht, as hereinafter set forth, and that the same was due to the carelessness and negligence of the owner, officers, and members of the crew of the said yacht; respondent denies that the damages and injuries suffered by her were occasioned and incurred without the privity or knowledge of the said Henry C. Yeiser, Jr., and avers that the said injuries caused her thereby, were occasioned and incurred with the privity and knowledge of the said owner of said yacht; and respondent expressly denies that the injury and damage to claimant was due to an unforeseen and unavoidable accident, but to the contrary, says that said injuries could have been foreseen and avoided by the exercise of reasonable care on the part of Henry C. Yeiser, Jr., and that said injuries were due to the negligence and carelessness herein set forth.

Fifth: Respondent admits the allegations of the article numbered five in the said libel and petition, in that she has petitioned the Probate Court of Hamilton County, Ohio, for permission to file a claim against the Estate of Henry C. Yeiser, Jr.

Sixth: Respondent is without knowledge as to the allegations contained in the article numbered six of the said petition as to freight pending by reason of the said trip.

Seventh: Respondent avers that the petitioner is not entitled to the benefit of the limitation of liability provided for in Sections 4281, 4282, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States, being Sections 183, 184 and 185 of Title 46 United States Code Annotated, and the various Acts amendatory thereof and supplemental thereto, or otherwise. And answering further, respondent avers that the petitioner is not entitled to exemption from liability for the damages and injuries done, occasioned, or incurred by respondent, by  
 34 reason of the escape of carbon monoxide or other noxious gas as hereinafter set forth.

Eighth: Respondent is without knowledge as to the existence of any liens on the said yacht prior or paramount to the lien of the respondent that has accrued by reason of the damages and injuries aforesaid. Answering further, respondent is without knowledge as to the condition of the yacht, her present market value, and whether or not the said yacht has deteriorated in value since the said trip, as averred in Article "Eighth" of said petition.

Ninth: Respondent admits that the said yacht, at the time of the filing of the petition and libel was in the port of Fort Myers, in the Southern District of Florida.

Tenth: Further answering the libel and petition herein, respondent avers that on the 1st day of March, 1936, at the invitation of Henry C. Yeiser, Jr., now deceased, she was a guest for a cruise from Miami, Florida, and return, aboard the yacht "Friendship II," and that the said yacht was on coastal waters somewhere near the vicinity of Miami, Florida; that on the said night of March 1, 1936,

or the early morning of March 2, 1936, while she was asleep in the stateroom which had been assigned to her for the said cruise, by the said Henry C. Yeiser, Jr., on the said yacht, which stateroom was on the bottom deck of said yacht, at the stern thereof, and directly above the exhaust pipes supposed to discharge the gases from the motors of the said yacht, this respondent was overcome and rendered unconscious by carbon monoxide, or some other noxious gas, which had been permitted to escape from the motors and exhaust pipes of the said yacht and into the stateroom assigned to her as aforesaid, and where she was sleeping, as aforesaid; that as the direct result thereof, her entire system was poisoned and she has sustained severe and permanent injuries to her physical and nervous system and health that at the said time the said yacht was unseaworthy, and the exhaust pipes in the said yacht had holes in them, and were otherwise in such a defective condition as to permit carbon monoxide or other noxious gas to escape therefrom and into the stateroom which had been assigned to her as aforesaid, and in which she was sleeping as aforesaid.

35 That as the direct result thereof, since the date of the said injuries, she has been and still is, under care and attention of physicians and will be compelled to remain under their care in the future for an undetermined period; that she has been forced to incur and for an undetermined period of time in the future will incur great expense for hospital, medical, surgical, and nursing attention; and for medicines in and about attempting to cure herself of the said injuries; that the said injuries are permanent and are the direct and proximate results of the said negligence of the said Henry C. Yeiser, Jr., in assigning to her the said stateroom aboard his said yacht when he knew, or should have known, that the said yacht was unseaworthy, and that said stateroom was unsafe, and that said motors and exhaust pipes

were defective and in such condition that carbon monoxide gas or other noxious gas was escaping or would likely escape therefrom, as aforesaid, into the stateroom, which he had assigned to her and in which she was sleeping as aforesaid, and in permitting said gas to escape into said stateroom as aforesaid.

Wherefore, respondent prays that the Court will enter its decree herein declaring the petitioner to be liable on account of respondent's injuries and damages suffered as aforesaid; and denying the right of the petitioner herein to a limitation of the said liability; and that complete relief be granted to respondent by the entry of a judgment against the petitioner for the full amount of respondent's said damages and costs; that the Court determine respondent's proper share of the fund now in Court and distribute the same to her to be applied on the said judgment, and enter a personal judgment herein against the petitioner for any and all deficiencies thereafter existing, and that respondent may have such other and further relief in the premises, as in law and justice she may be entitled to receive.

EVANS, MERSHON &  
SAWYER,

M. L. MERSHON,  
W. O. MEHRTENS,

Proctors for Anne Elise  
Gruner.

36 State of Florida,  
County of Dade.

Before me this day personally appeared W. O. Mehrtens, who, being first duly sworn, says that he is an associate of the firm of Evans, Merhshon & Sawyer, Proctors in Admiralty, Miami, Florida, and of counsel for Anne Elise Gruner, the aabove described claimant; that he has read the foregoing answer and knows the



contents thereof, and that the same is true to the best of his knowledge, information and belief; that the sources of his knowledge or information are communications received from the claimant and her agents, and an examination of the vessel and the papers relating to the matter in suit; that the reason why this verification is not made by the claimant, is that the said claimant is not a resident of the State of Florida, and is not within this district.

W. O. MEHRTENS.

Sworn to and subscribed before me, this 23rd day of October, 1936.

(N. P. Seal)

WM. E. DUNWODY, JR.,  
Notary Public, State of Florida  
at Large.

My commission expires: 9/29/39.

11:1st 1/6  
10-23-36.

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37      On November 2, 1936, the United States Marshal filed PROOF OF PUBLICATION OF NOTICE TO CHARLOTTE JUST AND ANNE GRUNER to present their claims before the Commissioner.

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On December 11, 1936, RECEIPT OF THE CLERK OF THE COURT FOR THE PROCEEDS OF THE SALE OF THE SAID YACHT FROM THE TRUSTEE, was filed.

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On December 11, 1936, the Trustee filed his FINAL REPORT OF DISBURSEMENTS from the proceeds of the Sale of the said Yacht.

On January 9, 1937, the Libelant filed a NOTICE OF APPLICATION FOR AN ORDER REQUIRING THE CLAIMANTS, CHARLOTTE JUST AND ANNE GRUNER, TO ANSWER CERTAIN INTERROGATORIES, the said Interrogatories being attached to the said Notice.

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On January 9, 1937, the Libelant filed a Notice of HEARING OF HER MOTION FOR LEAVE TO INSPECT AND MAKE PHOTOGRAPHS OF THE EXHAUST PIPE OF THE SAID YACHT, the said Motion being attached to the said Notice.

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On January 9, 1937, the Claimant, Charlotte Cross Just, filed EXCEPTIONS TO THE INTERROGATORIES propounded to her by the Libelant.

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On January 9, 1937, the Claimant, Anne Elise Gruner, filed EXCEPTIONS TO THE INTERROGATORIES propounded to her by the Libelant.

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On February 24, 1937, there was entered and filed an ORDER SUSTAINING THE EXCEPTIONS OF JUST AND GRUNER TO THE INTERROGATORIES propounded to them by the Libelant and also  
38 granting the Libelant's Motion for leave to inspect and make photographs of the exhaust pipe of the said Yacht.

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On October 2, 1937, the Claimants, Just and Gruner, filed a MOTION TO SUPPRESS THE DEPOSITION OF DR. YANDELL HENDERSON.

On October 8, 1937, a STIPULATION was filed agreeing to the opening of the deposition of Dr. Yandell Henderson.

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On the 2nd day of May, 1938, TRANSCRIPT OF THE TESTIMONY was filed in words and figures following, to-wit:

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In the United States District Court for Southern District of Florida, Miami Div.

39

No. 147-M-Adm.

In the Matter of: The American Yacht Friendship II.

Transcript of proceedings had and testimony taken in the above-entitled cause before the Hon. John W. Holland, District Judge, at Miami, Florida, October 5-15, 1937.

Appearances:

Kirlin, Campbell, Hickox, Heating & McGrann (By Raymond Parmer, Esq.), and

Loftin, Stokes & Caulkins (By Messrs. Stokes and Coleman),

In Behalf of the Petitioner.

Evans, Mershon & Sawyer (By Messrs. Mershon, Mayne and Mehrtens),

In Behalf of the Claimants.

Reported by Henry E. Colman.

40

The Court:

Now, gentlemen, I have read the letters which were written yesterday following the discussion of this

case in chambers. I find that on February 20th of this year I addressed a joint letter to counsel which particularly referred to the matter of interrogatories, but in that letter I made this comment: "The case of Hartford Accident Company vs. Southern Pacific Company, 273 U. S. 215, sets out how the issues should be tried."

The cases cited by counsel for the claimants are, first, the *Pere Marquette*, 203 Federal, which was decided in 1913. Of course the next case, *In re Davidson S. S. Company*, 133 Fed., was before that date. The case of *S. S. Hewitt*, 284 Federal, was decided in 1922. The *Erie Lighter* case, 250 Federal, was of course before that date. The case of *Black Eagle*, 8 Federal Supplement, was decided subsequent to the date of the decision of the Supreme Court of the United States in *Hartford Accident Co. vs. Southern Pacific*, which was decided in 1926. However, this District Court decision in 8th Federal Supplement deals with the matter of interrogatories and not primarily with the matter of interrogatories; and what was said in that case of *Black Eagle* appearing to be referring to the particular matter of procedure was a quotation from the *Hewitt* case decided in 1922. The case of *Diamond Coal Company*, 297 Federal, was decided about 1922; at least certiorari was denied in 1923, hence it is that so far as dates are concerned, this Hartford case seems to be the one that the Court  
41 should follow, and I think it certainly sets out very clearly what should be the course of procedure. Therefore, it would seem to me that, just as it is indicated in that case, the question first to be decided is whether there was liability at all and, second, whether the owner may void that liability.

As I understand the issues here, if liability is determined to exist on that first issue, it includes a finding that the Master was at fault, and leaves upon the question of whether there was any privity of knowledge on the shipowner.



Now, do counsel prefer that I make some announcement at this time as to my observations as to the burden of proof, or would you rather proceed with the announcement already made and let the matter of burden of proof be decided as the cases goes on?

Mr. Parmer:

For my part I think I would agree that we have the burden of showing absence of privity, that is, absence of personal responsibility on the owner, whereas the other side has the burden of proving negligence, that is, original liability. That splits the burdens and I think Your Honor has covered very well the question of who go forward, that is, that the matter of liability must be dealt with first, and since they have the burden on that they would go forward on that issue. That is my understanding of it and I would agree to that.

Mr. Mershon:

I think, if Your Honor please, that counsel has made a fair statement of the respective burdens. I am not now discussing what constitutes meeting the burden of proof of liability. There may be such a thing as a presumption itself from the facts meeting the burden. I agree that the burden is on the one asserting liability, which would be the claimants, and if that issue is decided in favor of the petitioner, that ends the case. If, on the other hand, that issue is decided in favor of the claimants, automatically there is a finding then that the Master or those under him and the owner were responsible or were negligent.

Will Your Honor give us about two minutes to confer with counsel? I want to see if we can save some time.

The Court:

All right; you will let me know when you are ready.

(Recess.)

Mr. Mershon:

We would like at this time to have confirmed the understanding which we gathered from Your Honor's statement this morning, that we will proceed and the Court will determine the issue of liability and the issue of the right to limit before we go into the question of damages.

As we understand the procedure, after determination of the issue of liability and right to limit, if liability be found and the right to limit be denied, or even if the right to limit be granted, the Court then proceeds to determine the question of damages, and in some instances those damages may not equal or exceed the value of the

vessel. In any event, it will be necessary to go into the question of damages, and we ask the

Court to go now into the issues of liability and the right to limit, and to defer the hearing on the question of damages until after these two questions have been decided. I say that for several reasons. The first and foremost being the fact that our clients, Mrs. Just and Miss Grunow, who live in St. Louis, are unable to be present at the trial of this issue, of the first two issues, but we expect and hope to have them available for the trial of the question of damages. We have here to present to the Court, if he is interested in seeing them, letters of their physicians, stating that their condition is such that they cannot safely go through at this time the ordeal of a trial. Coupled with that is the fact that on the question of damages and extent of injury there is a mass of medical testimony to be considered by the Court, to be submitted to the Court and considered by the Court; five or six hundred pages of which is in a transcript of testimony taken on deposition of physicians in and around St. Louis, Missouri, which transcript is in the process of being written up and is not now available, and under the rule of Court which permits the Court itself to arrange the procedure as the circumstances may warrant and the ends of justice may re-

quire, we ask Your Honor to limit the present hearing on the issues of liability and the right to limit.

Mr. Parmer:

Your Honor, in reply to that I would say that it would be most inconvenient and indeed most unusual to conduct a trial of this kind in that fashion. It is true that there are a number of issues, and it is the usual thing to put in all of the proof on the one trial with regard to all of the issues, and then, on the other hand, as Your Honor has observed in the Hartford case, the Supreme Court does lay down the order in which it decides those issues, and it is indeed most unusual to have two separate trials on the issues. For the convenience of the parties, and I might say of the counsel who live at any great distance, that it would be somewhat of a holiday to have to return to Florida. I think it would be as much a burden to Mr. Mayne to have to return from St. Louis, although I am not speaking primarily for him, but I am speaking for myself. I do not see why all of the evidence, with the exception of that which is contained in depositions, which may be here before this trial is over, cannot be presented now, and if I may say a word with regard to what may really be the fine Italian strategy is trying a case, I can say that it is most unusual for claimants in a personal injury case to be absent at the main issue, at the trial of the main issue of liability. I know I shall be inconvenienced if I do not get an opportunity to cross examine the claimants on this question of liability.

(Extended discussion between counsel and the Court off the record.)

The Court:

I shall first make this clear: In the determination of the two issues, liability or not, and, secondly, limitation

of liability, the evidence will be considered on these two issues; in other words, the evidence will be heard on these two issues at the same time, before any announcement of the Court is made on either one or the other. This Court is very much of the opinion that it is wise to determine the question of liability in admiralty matters and save the matter of damages for a subsequent consideration. I have been on the bench only about 15 months, but I have followed that practice and in some cases with satisfaction. It is more or less a rule of this District. Dr. Strum of this District decided a case of more or less magnitude where that practice was followed. That case was recently reported in one of the Supplements, and you will find that, if you are interested, under the style of Jacksonville Forwarding Company. I was very much interested in that case because of my connection with it as District Attorney. In that case the issue of liability was determined and then the question of damages was considered; so I shall follow that rule in this case.

Now, with reference to the contention made by the petitioner that prejudice will arise out of inability to examine the two claimants on the question of liability, or what those two parties know about the whole affair, the Court will reserve that matter. If in the progress of this case the Court is of the opinion that these two claimants should be examined, the Court will direct that their examination take place before there is a decision made on this question of liability, and that will be ascertained as the case progresses.

Mr. Farmer:  
Very well.

46 The Court:  
You may proceed.



Mr. Mershon:

If Your Honor please, we have outside the copper tubing or exhaust pipes which are the principal exhibits in this case. They were impounded by order of this Court and they have been in Withers Warehouse until this time, and with the Court's permission I should like to have them brought in and placed on the floor of the Court Room, and then take such steps as may be proper to identify them and go ahead with this case.

The Court:

Is it a representative of the Withers Storage house that brings these into Court?

Mr. Mershon:

Yes.

Mr. Parmer:

I think we can probably agree with you on that.

Stipulation.

• Mr. Mershon:

It is stipulated between the parties by their respective counsel in open Court that the six pieces of copper exhaust pipes and coverings thereon and attachments thereto are brought into Court by John E. Withers Transfer & Storage Company, in whose possession said pipes have been since they were impounded as exhibits in this case under order of this Court, and that the said articles are in substantially the same condition now as when they were delivered by Donovan's Boatyard to John E. Withers Transfer and Storage Company.

Mr. Parmer:

We may differ with regard to the meaning of "substantially the same". I will say they are the same pipes

and that they have the same wrappings around them, that they are the same length and relatively the same degree of—

47 Mr. Mershon:

We want you to agree that they are the same holes in there now. That exactly the same holes are in there now as they were at the time of delivery to Withers Transfer and Storage Company.

Mr. Parmer:

All right, we agree with you on that.

Mr. Mershon:

We would like to call Devoant's employee to identify these pipes.

Mr. Parmer:

I think we can stipulate with you on that, if you wish.

Mr. Mershon:

I will need this witness to arrange the pipes.

Thereupon, HARRY P. BRACKEN was called as a witness in behalf of the Claimants, and having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Mershon:

Q. What is your name, sir?

A. Harry P. Bracken.

Q. Where do you live?

A. 151 N. W. 41st Street.

Q. By whom are you employed and in what capacity?

A. At the Coconut Boatyard—Coconut Grove Boatyard—machinist.

Q. Is that generally known as Donovan's Boatyard?

A. Yes. But is usually called Coconut Grove  
48 Boat Works.

Q. I show you these six pieces of pipe which are marked for identification Claimants' Exhibits 1 to 6, respectively. Have you seen these pipes before?

A. Yes.

Q. Where did you first see them?

A. I took most of them out of the boat, disconnected the bolts and took them out and brought them into the shop.

Q. You took these pipes out of the yacht Friendship II when she was on the ways at Coconut Grove Boat Works?

A. Yes, sir.

Q. Are the pipes, with the possible exception of the wrappings, in the same condition as they were when you first saw them in the boat and took them out?

A. I will say they are practically the same, very little change.

Q. As far as the pipes are concerned and the patches on them, do they appear to be the same?

A. The same.

Q. Did you remove the patches?

A. I didn't; we were not interested in the old ones; we were putting in new pipes.

Q. Was the Friendship II there for the purpose of taking out these exhaust pipes and installing new ones?

A. That was one of our jobs.

Q. What dimension pipe is this?

A. It is measured from the outside.

Q. Will you look at it, please, sir, and tell  
49 us?

A. If I had a rule.

Q. Here is a pencil; that might—

A. It is 2½.

Q. Do you recall what size pipes were replaced in the boat to take the place of these?

A. No, sir, I don't remember whether we changed the size or not, but I think we did.

Mr. Parmer:

Just a minute. I move to strike out "I think".

Mr. Mershon:

We will strike the answer and the question. If he doesn't know, we will show that by someone else.

Q. I believe you say this was about 2½ inches?

A. Yes, sir.

Q. That can be measured?

A. Yes, sir.

Q. How can you show us which side of the boat the pipes, Exhibits 2, 3, 4, 5 and 6, being these five up here—

A. I couldn't remember except from the markings, but I remember that these came off the front end of the section; I remember that all right.

Q. I will mark this one Exhibit 2, this one Exhibit 1, this one Exhibit 3, this one Exhibit 4, this one Exhibit 5 and this one Exhibit 6. Mr. Bracken, did you put these tags on there and mark them for the purpose of identifying them?

A. Mr. Dowling I believe put these tags on them. When I took them out I marked some of them with a red pencil.

Q. Look at this length of pipe marked Exhibit 50 3 and note the red letter on there. Who put that on there?

A. I did.

Q. Can you from that identify what part of the boat this pipe came from?

A. From the port side.



Q. Then that is the port exhaust pipe?

A. Yes, sir.

Q. Look at the piece of pipe marked Exhibit 6 and see if there are any markings on there by which you can identify that.

A. I remember this clamped piece of hose on there and the wrappings.

Q. Is that a part of the port exhaust pipe?

A. I think it is.

Mr. Parmer:

I move to strike out "I think it is".

The Court:

The motion is granted.

A. It looks like the one we took out. Without looking at the markings I couldn't say whether it was the port or starboard. I would have to depend on the markings.

Q. Examine the tags and markings and see if there is anything that you placed on there or had placed there by which you can recall which side.

A. Yes.

Q. Can you now state positively that this length of pipe, Ex. 6, is a part of the port exhaust pipe?

A. Yes, sir.

Q. Did you take that out of the Friendship II?

51 A. Yes, sir.

Q. All right, look at Exhibit 4 and see if you can tell what part of the boat that came out of?

A. This part, you see, is the front end of the port section, on the port side.

Q. That is part of the port exhaust pipe?

A. Yes, sir.

Q. All right, refer to this piece of pipe, Exhibit 5, and see if you can identify which exhaust pipe that is; is that a part of the same port exhaust pipe?

A. Yes, sir.

Q. Please state whether these five pieces of pipe, Exhibits 2, 3, 4, 5 and 6 constitute the entire port exhaust pipe, or if there is anything missing; if so, state what it is?

A. Just one piece missing.

Q. What piece of pipe is that?

A. Similar to that one (pointing); the piece that goes next to the engine.

Q. The piece missing would be a piece similar to Exhibit 1, is that right?

A. Yes.

Q. Now I will show you this piece of pipe, Exhibit 1, and ask you what that is?

A. That is the front section; that connects to the engine.

Q. Is that a part of the port or starboard exhaust pipe?

A. That must be the starboard, I think.

52 Q. Check that and see.

A. I know now that it is the starboard.

Q. And with the exception of a piece of exhaust pipe similar to Exhibit 1, which goes next to the engine, these five pieces, Exhibits 2 to 6, inclusive, complete the port exhaust pipe as you found it in the Friendship II?

A. I believe they complete it; at least that was all of the port section; I don't believe there is anything left.

Q. Can you arrange this port exhaust pipe and these pipes in the order in which they run back from the engine to the stem of the boat?

A. I believe I could.

Q. Do that sir.

A. There was a piece like this that came from the engine.

Q. A piece like this (Exhibit 1)?

A. Yes, sir.

Q. Which joins this (Exhibit 2)?

A. Yes, sir.

Q. All right, let's arrange these in order.

A. All right. This is the back of the exhaust.

The Court:

Referring to Exhibit 1.

Q. Then I ask you if the port exhaust pipe as you found it in the Friendship II and took it out, was arranged in the following order, namely, a piece similar to Exhibit 1 was connected to the engine, to which was immediately fastened the piece, Exhibit 5, of 53 which Exhibit 2 is a segment, that is, has a piece or segment cut off to which Exhibit 2 was fastened to a piece of pipe, Exhibit 6, to which in turn was fastened a piece of pipe, Exhibit 1—

The Court:

Mr. Mershon, isn't there another piece?

Q. (Continuing.) Wait a minute. To which was fastened the piece, Exhibit 4, and to which was connected the piece of pipe, Exhibit 3?

A. Yes, sir.

The Court:

Does Your Honor get that clearly?

The Court:

Yes.

Mr. Mershon:

That is all. Do you want to ask him any questions, Mr. Farmer?

## Cross Examination.

By Mr. Parmer:

Q. I would like to know on what date you took these pipes from the Friendship II?

A. I couldn't tell you that.

Q. Do you know the month?

A. No. It was the early part of last season; that is about all I can tell you; I don't remember dates at all.

Mr. Parmer:

Can you supply us with the dates, Mr. Mershon?

Mr. Mershon:

Yes. It may be stipulated in the record that the pipes were taken out of the houseboat Friendship II on October 22, 1936.

54 The Court:

Mr. Witness, have you personal knowledge of the disconnecting of the different exhibits, and also the sawing asunder of the several pieces as they appear here?

The Witness:

Yes, sir.

The Court:

Give us that personal knowledge.

The Witness:

My knowledge is that in sawing these off I always made use of this line so I could tell just where to saw.

The Court:

Have you personal knowledge of the sawing asunder of that middle pipe there (pointing)?



The Witness:  
Yes, sir.

The Court:  
Tell us about that. Why was it sawn asunder at that particular point?

The Witness:  
All of this stuff goes under the floor and you had to cut them up to get them out.

The Court:  
So that particular point for sawing asunder was selected then because of the structure of the boat?

The Witness:  
Yes, sir.

The Court:  
Is the same true with regard to the other sawing that was done?

The Witness:  
Yes, sir. You will notice right here on these.

The Court:  
What are you referring to now?

The Witness:  
Exhibits 2 and 5. The floor was in such shape that I had to reach out and saw it with one hand.

JOHN G. McKAY, a witness produced in behalf of the Claimants, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Mershon:

Q. Please state your full name?

A. John G. McKay.

Q. What is your profession?

A. Lawyer.

Q. Where do you live or reside?

A. 6661 Collins Avenue, Miami Beach, Florida.

Q. Where is your office?

A. First National Bank Building, Miami.

Q. Are you a member of the firm of McKay, Dixon & DeJarnette?

A. I am.

Q. How long have you lived in Miami and Miami Beach?

A. Since late in '24.

Q. And you have practiced your profession as a lawyer here since that time?

A. Continuously since that time.

Q. Did you know Mr. Henry C. Yeiser in his lifetime?

A. Quite well.

Q. Under what circumstances did you first get acquainted with him?

A. Mr. Yeiser and I were in the same section of the Balloon School at Ft. Omaha, and had our bunks right next to each other in the Barracks. We were studying ballooning to become balloon observers.

Q. Was that when you were in the Army during the World War?

A. That is right.

Q. Had that friendship existed?

A. It had; we saw a great deal of each other in the War. Later on I was in command of the Cadet Company and Mr. Yeiser was my top sergeant. We became quite close friends then and it continued until the time of his death.

Q. After the War was over and Mr. Yeiser went back to business, and you resumed the practice of your profession, did you have occasion to see him and know his family?

A. I did. I saw him quite often; I knew his family; we visited back and forth at that time; at that time, immediately following the War, I lived in Indianapolis and he lived in Cincinnati, two and one-half hours apart by train, and we quite often spent week ends together.

Q. In the course of that friendship, did you in more recent years see Mr. Yeiser in Miami?

A. Yes, Mr. Yeiser visited Miami from time  
57 to time for many years. He afterwards purchased through my office the Friendship I and I took many trips with him on that; later he purchased the Friendship II, and I took many trips with him on that; he was very hospitable with his boats and it was a very nice way for me to spend the week ends.

Q. Do you know Mrs. Charlotte Just?

A. Quite well.

Q. When did you first meet Mrs. Just?

A. Well, it was, I would say almost three years ago now, two and one-half years ago—in the early winter of '35.

Q. Where was Mrs. Just's home?

A. Mrs. Just's home was in St. Louis.

Q. Where did you meet her?

A. I met her at the Nautilus Hotel.

Q. She was visiting during the winter time at Miami Beach?

A. She and her mother—her aunt and grandmother—they stopped at the Nautilus Hotel.

Q. After you met Mrs. Just, did you get to know her quite well?

A. Yes, we went to a good many places together and seemed to be fond of going places together; I saw her fairly often.

Q. Did you meet Miss Ann Gruner?

A. I met Miss Ann Gruner a year or so later; she was here visiting Mrs. Just and I met her with Mrs. Just.

Q. Did Mrs. Just return to St. Louis the spring or summer after you first met her?

A. Yes.

Q. Did she later return then to Miami Beach  
58 for the winter of 1935-36?

A. That is right; she did.

Q. Was that the time Miss Grunow visited Mrs. Just?

A. That is right.

Q. Who was Mrs. Just here with after that time?

A. She was living here with her aunt, Mrs. Bischoff.

Q. Do you remember an occasion about the 1st or 2nd of March, 1936, when Miss Grunow and Mrs. Just were on the Friendship II and became ill?

A. I do quite well.

Q. Were you aboard the Friendship II at that time?

A. I was.

Q. State the circumstances as you recall them, of that trip, the plans for it and how it came to be taken?

A. Miss Grunow was here visiting Mrs. Just. I had taken Mrs. Just and Miss Grunow aboard the boat once or twice, maybe more times than that when they were docked here, and Mr. Yeiser had invited all of us to take the trip with him. We had first made plans to take the trip a week earlier and did not take it. Then we made plans to take it on this Friday around the 1st of March.



Q. Was it February 28th, 1936?

A. It was the Friday right near the first of March.

Q. The Friday immediately preceding the 1st of March?

A. Yes.

Q. All right.

A. I came over town in the morning, left my bags aboard the boat and went to the office and came back about 2:30 or 3 in the afternoon. The girls were driven over by their driver and went aboard the boat and were aboard for luncheon when I came aboard; we got under headway right soon after that.

Q. Let me ask you right there, where was the boat docked?

A. Royal Palm Dock.

Q. At Miami?

A. At Miami.

Q. All right.

A. We got under headway with the boat soon after I went aboard, and that afternoon and early evening went down as far as the inside mouth of Angel Fish Creek and anchored just north of Pumpkin Key.

Q. About how far south of Miami is that?

A. I would say thirty-six or thirty-eight miles; it is right near Key Largo Anglers Club.

Q. Do you recall whether or not you got down there before dark or shortly after dark?

A. We got down there shortly after dark, I think. I am not clear on the exact time of arrival but I think we reached there shortly after dark.

Q. What did they do with the house boat when you got there?

A. Anchored and stayed there that night, Saturday—I don't recall definitely where we fished but we fished around Angel Fish Creek, possibly out on the reef by Crawford's Light; I think I went around fishing that day over on the banks.

Q. Did you fish from the house boat?

A. No; we towed a cabin cruiser; the cabin cruiser had a 250 horse power Paul Scott Motor. We had two boats. We used those two boats to fish from, tying those up to the house boat when we came back.

Q. Did the house boat remain anchored in that position then until you started back to port in Miami?

A. My recollection is that it did.

Q. That was Saturday you went fishing?

A. Yes, and Sunday we went fishing, and I wanted to be in my office Monday morning, so Sunday night we left—right before daylight to come back to the dock here.

Q. Do you remember what crew was aboard the house boat?

A. There was Captain Roberts, Chief Engineer Blount and a sailor—I don't recall his name—and a cook, and a cabin boy, or steward or waiter.

Q. And in addition to those persons, you and Mr. Yeiser, Mrs. Just and Miss Grunow were aboard?

A. That is right. Just a minute—there may have been another fishing guide on that trip but I am not clear as to that; sometimes we take another fishing guide with us; Roberts ran one fishing boat and the fishing guide ran the other.

Q. Can you describe briefly the lay out of  
61 the Friendship II?

A. Above on the top deck there was forward a clear deck space; then came the Captain's quarters and the wheel house. The Captain's quarters were right in the wheel house, he had a bunk immediately aft of the wheel; after that was the living room or salon, I guess you would call it, aboard a boat, a very beautiful room; after that was Mr. Yeiser, the owner's cabin, and after that was a large after deck with a large wide couch on it.

Q. Across it?

A. Across it, from beam to beam. The deck below was the crews' quarters, and forward the galley and the refrigeration layout and then the engine room and the dining room, then the space for guests' cabins.

Q. Beyond the dining room towards the stern?

A. Yes, aft from the dining room there was a hall that ran down the center of the boat to about—it ended dead in against the largest state room, the only double state room, that state room ran from one side of the boat to the other and the hall ended against it; that state room had a bunk against the port wall and one against the starboard wall and it had a bureau or table between the two bunks.

Q. Now that state room—was there a private bath opening into it?

A. Immediately on the other side of the boat was a private bath which opened on to that state room.

Q. How many windows were in that state room?

A. I think there were four and I think there was one tub bath room there—there may have been six but I think there were four, two on each side.

Q. Go ahead with the description.

A. Immediately forward on the starboard side, immediately forward from this largest room on the starboard side was another bath that opened into the hallway, it didn't open into the stateroom and it was used by the guests in their cabins. Immediately forward of the two baths were two cabins, a single cabin on each side of the hallway.

Q. Now that hallway ran from the dining room back to the master state room?

A. That is right, aft of the master state room.

Q. Which of the state rooms did Mr. Yeiser occupy?

A. He occupied the owner's state room on the upper deck.

Q. Had he made a practice of occupying that state room at all times?

A. Always—at every time I had been aboard the boat.

Q. Had he lived aboard this boat?

A. Yes, he made it his home while he was down here.

Q. When had he come down that winter before this March 1st that we are talking about?

A. Well, I can't tell you exactly but I think we fished all around Palm Beach as early as September that Fall.

Q. So he had been living aboard the boat  
63 and occupying that top deck cabin since about September?

A. He went back to Cincinnati once or twice or more.

Q. Did he spend most of his time here aboard the boat?

A. Most of the time, yes.

Q. Which state room did the ladies occupy?

A. On this trip, they occupied the master state room aft, the only double state room that was aboard the boat.

Q. Which state room did you occupy?

A. I occupied the starboard state room, starboard single state room.

Q. That was the state room on the right of the hall as you come out of the master state room and start toward the dining room?

A. Right.

Q. As the Friendship II left the Royal Palm Dock and headed south on this Friday afternoon, where did you and Mr. Yeiser and the other guests, the two ladies, spend the time?

A. We spent some of the time on the aft deck and sometimes forward, and sometime in the wheel house, watching the operation of the boat until dinner time;



then we had dinner in the dining room, and then we went in the living room a little while after that.

Q. Did either you or Captain Yeiser or the ladies spend any time in this double state room until after the boat had anchored down here and her engines were cut off?

64 A. I don't recall; we probably all went to our state rooms to get washed up before dinner.

Q. Was there any considerable period of time spent in that stateroom?

A. No.

Q. I show you a photograph marked for identification Claimant's Exhibit No. 7, and ask you if you recognize the view there shown?

A. I do; it has a view looking toward the port side of the boat showing the view of the port berth and the master state room and looking into the bath room which connected to the master state room.

Q. Is that a fair representation of that state room as it existed at the time of this trip?

A. I would say so.

Q. I show you another photograph marked for identification Claimant's Exhibit 8 and ask you if you know what that is, and if so, please state.

A. That is a view looking from the master state room, looking at the starboard bunk, showing the closet forward of the forward bunk.

Q. Are both of these views of the state room which Mrs. Just and Mrs. Gruner occupied on this trip?

A. Yes.

Mr. Mershon:

We offer these in evidence.

Mr. Parmer:

There will be no objection.

The Court:

They will be filed in evidence.

65 (Thereupon the photographs above filed in evidence were marked Complainant's Exhibits Nos. 1 and 2, respectively.)

Q. Mr. McKay, starting that Sunday afternoon, please relate what happened aboard the boat insofar as you know, up to the time she docked again in Miami?

A. We came in from fishing Sunday afternoon; after cleaning up, we had dinner; after having dinner, we sat around the living room for a while playing a little bit of contract and then went out on the after deck and sat around there for an hour or two perhaps, and the girls said they were tired and went to bed. I don't know what time they went to bed but I imagine around 11 or 12 o'clock. Mr. Yeiser and I sat around and "bulled" a while about old army times and then we retired. I went to my state room and went to bed. In the morning I awakened at daylight, and I looked out and had some idea we were under headway or moving and I saw we were not a great way from Miami and decided to dress and did, and when it came time for me to comb my hair, I didn't have—

Q. Let me stop you right there—

A. Are you talking about Monday morning? You said Sunday afternoon?

Q. You are talking about Sunday afternoon; not Monday morning.

A. That is right.

66 Q. Now you woke up Monday morning and saw the boat was underway—

A. And got dressed; when it came time for me to comb my hair, I had forgotten my comb when I packed the bags and had used a comb belonging to one of the girls, in fact at dinner time that night I kept that

about—the comb I used it merely at dinner time and took it to my state room but in the morning it was not in my cabin; I went back to their cabin, I thought it was about time they would be up anyway, and rapped, and there was no reply.

Q. You rapped on the door?

A. Rapped on the door; I rapped two or three times.

Q. Was the door open or closed?

A. The door was closed; I rapped two or three times and got no reply; I opened the door and looked in and they were both in bed fully covered, so I opened the door entirely and stepped in the room and walked over to the bureau which is between the two beds and right in the center of the bureau was this comb; I picked up the comb and turned around and started to the door; I was within a step or so of the door and it occurred to me rather peculiar that I had not seen any movement from either one of them, and I turned to Mrs. Just and I said: "Aren't you going to say good morning?" and there was no movement. I shouted: "Shoddy, are you going to say good morning?" There was still no indication of any movement; I looked at her then and I noticed that she was breathing and it seemed fairly normal to me, but her mouth hung down a little

67

bit unnatural and I went over to her and shook her and said "Shoddy", and she made no movement; she didn't move; I then turned across to where Miss Gruner was and I said: "Good morning, Ann", and she made no movement at all. As I recall, her mouth was quite tightly closed, and she was breathing natural through her nostrils. I put my hand on her shoulder and I shook her; I said "Ann", and she made no reply. I turned back again to Mrs. Just and shook her again rather hard and there was no reply. I had in mind at first that they were putting up a game on me. I immediately looked and saw that the windows were all closed in the state room. I immediately opened a

couple of them and when I looked in the bathroom, the bathroom windows were closed. I immediately opened a couple of the windows and then went to the stairs and went upstairs and found Mr. Yeiser sitting on a table just outside the wheel house, and I told him what I had found; he said: "Well, come on down and I will take a look at them", or words to that effect. We went below and he spoke to both of the girls and tried to awaken them and they didn't awaken, and he said: "Well we better get them to hell out of this", so we called the waiter and we told the waiter to call Captain Roberts, who was probably stronger than either one of us and Captain Roberts came down and carried them one at a time and laid them out on the bench on the back deck.

Q. You mean on that broad high back couch?

68 A. Yes, broad couch effect.

Q. About where were you by the time the ladies were laid out there in the open air?

A. Well I would say we were right—oh, within two or three miles or a mile or two of the Royal Palm Dock.

Q. Where did the Friendship II finally dock?

A. It docked at the Royal Palm Dock again.

Q. That is down here at the foot of Bay Shore Drive, near the Royal Palm Hotel?

A. Right.

Q. Then what happened after the ladies were stretched out in the open air on this couch on the top deck?

A. They stayed stretched out there until we reached the dock and we immediately had Captain Roberts—sent him to telephone—and told him to call Dr. Howell.

Q. Dr. Spencer Howell?

A. Dr. Spencer Howell; he had been attending Mr. Yeiser once in a while when he was here in Miami.

Q. How long did you remain aboard the Friendship II after she actually docked?



A. I don't recall exactly, but I went to my office I think around 10 or 10:30, and stayed there for a short time and then returned to the boat.

Q. Were you still on the boat when Dr. Howell came?

A. I stayed on the boat until Dr. Howell came.

Q. Did he bring somebody with him?

69 A. No, I don't believe he brought anyone with him, but the nurse who had attended Mr. Yeiser had been sent for, and came there by the time he did or just before.

Q. What treatment, if any, did Mr. Yeiser or you, or any of the boat crew, give, or attempt to give either of the ladies, on board the boat, before the arrival of Dr. Howell?

A. We fanned them and saw that they got all of the fresh air that was possible, and I think that was all that was done.

Q. Were there any signs of life in either of them?

A. Oh, yes, they were breathing steadily; we took their pulse and the pulse could be felt in each one of them.

Q. Were they awake?

A. They were not awake; they were unconscious.

Q. About how long was it after you and Mr. Yeiser went in the state room and undertook to pick them up, before you got into the dock, would you say?

A. Oh, I would say twenty minutes to half an hour before we tied up.

Q. Had Mr. Yeiser and you jointly discussed what was the matter with them?

A. Yes, we did, after we got them upstairs; we mentioned that it was probably carbon monoxide poisoning.

Mr. Parmer:

I object to anything more than an answer to the question.

Mr. Mershon:

I am going to ask him this next question.

70 Q. Mr. McKay, had you and Mr. Yeiser reached any conclusion as to what was the matter with these ladies before the time you got into port?

A. I couldn't say we had reached any conclusion.

Q. Had you discussed the possibility of what might be the matter with them?

A. We had.

Q. Had you formed and expressed to each other any opinion as to what might be the matter with them?

A. We had.

Q. What was that opinion in which he shared and which he expressed to you as to what might be the matter with them?

Mr. Parmer:

I object to that as being irrelevant to this case. In any case, it is the opinion of a layman not qualified to form an opinion with regard to what illness, if any, these people were suffering from.

Mr. Mershon:

It is an admission against interest, if Your Honor please, because the decedent is in the position of the defendant in this case.

Mr. Parmer:

This is on a matter, Your Honor, regarding something that we know he is not competent to have an opinion on, and he is dead.

Mr. Mershon:

I will defer the pressing of that question until I have asked one or two other questions.

Mr. Parmer:

All right.

71 (By Mr. Mershon):

Q. What did you and Mr. Yeiser take into consideration in reaching your conclusion or opinion as to what was the matter with these ladies?

Mr. Parmer:

I object to that as being incompetent and immaterial.

The Court:

I think the objection is well taken.

Mr. Mershon:

If Your Honor please, he objected to the opinion and I asked this merely to show that the opinion was a logical one; he objected to the other question because it was the opinion of a layman, and I merely asked this to show that this opinion was a logical one and one which a layman may reasonably have reached. In addition to that, the matters that they took into consideration may well be admissions against interest.

The Court:

I think an admission against interest ought to be on facts and not an opinion.

Mr. Mershon:

If Your Honor please, I will ask that question a little differently.

Q. Did Mr. Yeiser make any expression at this time as a part of what was going on there as to what was the cause of this illness?

A. Yes, sir.

Q. What did he say was the cause of it?

Mr. Parmer:

No objection.

A. He said that he thought it was caused by carbon monoxide gas.

Q. I believe you stated that Dr. Spencer Howell came while you were aboard the boat?

A. That is right.

72 Q. To the best of your recollection, what did he do?

A. He examined the girls by taking their pulse, taking their respiration—he raised their eyelids and looked in their eyes. He examined their extremities, etc., and then gave some instructions for the nurse.

Q. Did he give any treatment in the way of various things, if so, what did he give? Any injections.

A. He didn't give any, but the nurse gave a hypodermic.

Q. While he was there?

A. While he was there.

Q. Did the nurse apply any other treatment while he was there, any respiration or artificial—

A. There was an oxygen tank that came aboard or a steel tank which was pointed out as an oxygen tank, with a kind of head arrangement to go over the patient's nose and mouth, connected to it. He gave the nurse some instructions about that. I didn't hear that.

Q. Did Dr. Spencer Howell make any inquiry as to what had happened to them?

A. Yes, he did.

Q. Did he inquire of Mr. Yeiser?

A. He inquired of Mr. Yeiser and he inquired of me?

Q. Do you know what Mr. Yeiser told him?

73 A. Yes, the inquiry was made sitting opposite both of us—one inquiry was made sitting beside both of us on the couch.

Q. What did Mr. Yeiser tell him?

A. He told about finding them—about my finding them, as I have told you.

Q. What did he tell the doctor as to the cause of their condition, if any?

A. He told him he thought it was a carbon monoxide case.

Q. Did Mr. Yeiser offer any explanation or reason why he thought it was a carbon monoxide case, in other words did he say—

A. That there were motors running on the boat in the morning.

Q. Now when did Miss Ann Gruner recover her consciousness?

A. I would say about 11:30 or 12 o'clock.

Q. That same Monday morning?

A. That same Monday morning.

Q. Was she on the boat after that time?

A. She was.

Q. What became of her after that?

A. She stayed on the boat during the day until about seven or eight o'clock that evening, and I took her up to Mrs. Just's aunt, Mrs. Bischoff's home, on the beach.

Q. What became of Mrs. Just? In other words, how long did she stay on the boat and what happened to her after she left?

A. She stayed on the boat until a little while after noon and then after Dr. Howell's orders, she was taken to St. Francis Hospital.

Q. Did you go along to St. Francis Hospital when she was taken there?

A. I followed in a car.

Q. You were at St. Francis Hospital when she was taken in there?

A. I was.

Q. Did you see Dr. Howell there when she arrived there or when you arrived?



A. Yes, she was there in his car, or in the ambulance— I have forgotten.

Q. In other words, he took her to the hospital as his patient?

A. Yes.

Q. Did you visit Mrs. Just after she was hurt?

A. Yes.

Q. How often would you say?

A. Daily for a time.

Q. What was her mental condition? Did she recognize you?

A. Well, after the first day or so—after the first day or two, she did—she didn't for the first day or two, but after that she did.

Q. Was she rational?

A. Well, she wasn't entirely rational. She wasn't herself.

Q. Did she carry on a conversation with you and remember what you said to her and what she said to you?

A. No, her memory was bad; she couldn't remember anything about the boat trip for a while and she couldn't remember anything before that; sometimes she would remember things that went on, and other times she wouldn't.

Q. When did she leave here to go back to St. Louis?

A. What is that?

Q. When did she leave here to go back to St. Louis?

A. I don't know. I would think it was around the latter part of April or early in May.

Q. Did you see her on any occasion after she left the hospital?

A. Many.

Q. She left the hospital about six days after she went in there, did she not?

A. That is my understanding, and my recollection.

Q. Tell us how her mental and nervous condition, as you observed it, after she came out of the hospital, compared with it as you knew her before her illness?

A. Well, before she was always bright and vivacious and fairly high strung and interested in everything that was going on; afterwards she couldn't remember; her memory wasn't clear; she was morose and melancholy.

Q. Was she interested in tennis, cards and dancing, things that were going on around her, after she came out of the hospital?

A. Not after she came out of the hospital.

Q. Had she been before she went to the hospital?

A. Very much; she resorted to tennis, dancing and swimming—things of that kind.

Mr. Mershon:

That is all; you may examine the witness.

#### Cross Examination.

By Mr. Parmer:

Q. Mr. McKay, you also, in connection with your friendship for Mr. Yeiser, did business for him, did you not?

A. Yes.

76 Q. And when I say business, we both mean "legal business"?

A. Yes.

Q. And he used to allow you, did he not, to have the use of this vessel when he was away?

A. Yes.

Q. And you could have it taken where you wished, and where you would direct the Captain to go?

A. That is right.

Q. You could invite your own friends on it, at your own election?

A. That is right.

Q. And you had, as a matter of fact, taken advantage of that invitation on the part of Mr. Yeiser?

A. Many times.

Q. Now, were you aware that prior to the trip on which the events with which we are principally concerned took place, that Mr. Yeiser was an alcoholic or perhaps a dipsomaniac?

A. Well, he was pretty close to an alcoholic.

Q. You were aware, were you not, of the fact, that by reason of whatever condition it was, alcoholism if it be that, that he had been placed under a guardianship?

A. Yes.

Q. By a Court in Cincinnati?

A. Yes.

77 Q. And the control of his effects had been taken from him personally and given to the guardian, whose name was Mr. Balch?

A. That is right.

Q. Are you also aware, or were you at that time, that for about a month prior to this voyage with which we are concerned, that Mr. Yeiser had been under the care of a physician, in an effort to cure him to some extent, of his alcoholism?

A. Yes, I think I was; we were all trying; all of his friends were trying to cure him.

Q. When you say "all of his friends", you include yourself?

A. Certainly.

Q. Well, referring to you personally, you had a personal interest in having him give up drinking so hard, as his habit was. Please answer the question.

A. I had a very personal interest.

Q. Answer the question.

A. I said I had a very personal interest.

Q. Then it is my hearing.

A. All right.

Q. Just before this trip took place, do you remember that you were requested by Dr. Howell not to go on it, and not to allow Mr. Yeiser to go on it?

A. I don't think directly. Before this particular trip, the week before, we were talking about going and I didn't go because Mr. Yeiser had been drinking; I would never go aboard his boat if he had been drinking and would never drink with him aboard the boat, of course, or anywhere else.

78 Q. Well, I am referring to this particular trip when Mrs. Just and Miss Grunow were along as passengers. I am asking with regard to that particular trip. Do you not remember that Dr. Howell pleaded with you not to allow Mr. Yeiser to carry out his intention to go on that trip because it would set him back?

A. No, I don't.

Q. Do you remember that the Captain of that boat himself, decided not to make the trip?

A. No, I don't.

Q. Well, were you not aware that when Mr. Yeiser left the control of the doctors and the nurses who were keeping him on a strict diet so far as liquor was concerned, that the likelihood was that he would drink too much?

A. No, not so long as I was present, not as much as he would under the control of the doctors and the nurse.

Q. Do I understand you correctly then that when you were present he would drink less than if the doctors were—

A. He seldom—

Q. Answer the question.

A. Yes.

Q. All right. You say that you did not drink in his presence while he was on the vessel on this trip?

A. I do.



79 Q. Do I understand from that, that you did drink on the vessel but not in his presence?

A. I think I had a bottle of brandy in my bag in my stateroom, and I think I took a drink out of that before dinner; I won't even swear to that, but I know I had none in his presence; and I know the girls had none in his presence.

Q. Well as a matter of fact, isn't it true that you and the girls were aware of Mr. Yeiser's condition, so far as alcoholism is concerned, and you were so particular about not letting him know that you were drinking liquor, that you kept liquor in the girls' room?

A. It is not.

Q. Didn't you get some drinks in the girls' room?

A. I think Sunday evening before dinner, after we had come in from fishing, we had a drink, I believe in the girls' room.

Q. And the drink was prepared there?

A. The drink was prepared there.

Q. Out of a bottle that was there?

A. Out of a bottle which I brought in.

Q. Was that the bottle of brandy to which you have already referred?

A. I imagine so.

Q. Let us not use your imagination; let us know what you remember.

A. I remember that it was.

Q. Very good.

80 A. All right.

Q. After you got through with that brandy, did you leave it there?

A. I did not.

Q. Now, Mr. McKay, this trip began on Friday and ended on Monday morning and was to a certain place down the harbor from Miami, was it not?

A. Yes.

Q. You don't know what you call this place?

A. Down Biscayne Bay here.

Q. Biscayne Bay?

A. Yes.

Q. You told us that after the boat came to rest, that is the big boat came to rest on Friday night, that it did not move again until Monday morning?

A. Probably it did, we might have. Well, no, I don't think it did.

Q. But you would not trust your own recollection in that respect?

A. I would not trust my own recollection in that respect. I made a good many trips down there.

Q. Now, as a matter of fact, during those three days when you were aboard on this ship, did not Mr. Yeiser do a lot of drinking?

A. I did not see him do any. He did some—

Q. That is an answer.

A. All right.

81 Q. Did he show the effects of having done it?

A. He showed the effects that I thought he had had some.

Q. That is he appeared to you to be intoxicated?

A. No, he didn't appear to be intoxicated.

Q. Would you describe it as slightly tight?

A. No, I wouldn't even say slightly tight; if you want me to describe it, I would say perhaps a little bit exhilarated.

Q. And that is the worst you saw him all of the time that he was away?

A. That was the worst I saw him all of the time that he was away.

Q. Now, would it refresh your recollection, Mr. McKay, in that respect, if I were to suggest to you that when he was seen by Dr. Howell, that Dr. Howell considered that all of his work for the month past had been wasted, and that he was a physical wreck?

Mr. Mershon:

We object to that, if the Court please.

Mr. Parmer:

I am asking him if it would refresh his recollection in that respect.

Mr. Mershon:

It is immaterial and irrelevant; his recollection has nothing to do with what Dr. Howell may have told someone else—if he is going to tell his recollection from what Dr. Howell told him—

Mr. Parmer:

This is cross examination. This witness has made a statement, and manifestly I do not believe it, and I am  
82 try to see if he will refresh his recollection from something I have offered to him. Anything that will refresh his recollection is pertinent. I am merely asking him if it will.

The Court:

You are not asking him to refresh his recollection by anything that he has previously said or done?

Mr. Parmer:

No.

The Court:

You are asking him to refresh his recollection by something independently and which has not been proven in this record?

Mr. Parmer:

That is correct.

The Court:

I think the objection is well taken. You may proceed.

(By Mr. Parmer):

Q. Well, did you observe yourself, that at the close of the voyage, Mr. Yeiser had gone back very much physically?

A. I did not.

Q. Did you see him in the next three days?

A. I did.

Q. And you know that he died at the end of the third day thereafter?

A. Yes.

Q. Now, Mr. McKay, you had charge in some respects, did you not, in taking his body back to Cincinnati?

A. Yes.

Q. And you and Captain Roberts went with the body to Cincinnati?

A. Right.

83 Q. And you saw Mr. Balch?

A. I did.

Q. Now when you were in Cincinnati and you saw Mr. Balch, did you say anything to him about what had happened concerning this voyage which was lately ended?

A. I did not.

Q. Did you say anything about the girls having been ill on the trip?

A. I did not.

Q. Did you instruct Captain Roberts not to say anything to Mr. Balch about it?

A. I don't believe I instructed him; I think we talked it over and determined that we would not say anything about it.

Q. Is that a positive statement that you did not instruct him to say anything to Mr. Balch about it?

A. I would say that I did not instruct him.



Q. Well now, you had been looking after the business interests of Mr. Yeiser for sometime?

A. Down here?

Q. Yes.

A. Yes.

Q. And you knew it was a matter of importance, did you not, to the business interests of Mr. Yeiser, as represented by Mr. Balch, to get information with respect to a matter of this nature?

A. No, I didn't think so at that time.

84 Q. Your experience, Mr. McKay, is largely in defending people against claims for personal injuries?

A. It is.

Q. And did it occur to you that such a claim might arise out of the circumstances of which you were a witness?

A. It did not at that time, not insofar as I recall.

Q. Was it merely a matter of neglect on your part that you did not speak to Mr. Balch about it, or was it a matter of intention?

Mr. Mershon:

We object, on the ground that it is incompetent, irrelevant and immaterial.

The Court:

Let him answer.

A. It was a matter of intention.

Q. In other words, you wished to keep the information from him about this?

A. No, I would never say that.

Q. Explain it in your own words.

A. I thought that these girls would be well soon and that it would just stir it up, I can't put my mind back to where it was at that time, but I didn't have any idea

of a claim at that time. It was a pretty sad time for all of us and I did not want to stir it up any more than we could help.

Q. That is you didn't want to stir anybody up at this end, at Miami?

A. No, at Mr. Yeiser's home in Cincinnati.

Q. Well, do you mean to say that if you told Mr. Balch, that you would stir up someone at Mr. Yeiser's home?

85 A. Well, there would be a lot of questions asked and I didn't think it was worth telling him about it.

Q. Mr. Balch is a lawyer, you know?

A. Yes; he is.

Q. A prominent lawyer in Cincinnati?

A. That is right.

Q. And you thought a lot of questions might be asked?

A. Yes.

Q. What sort of questions might, in your opinion, have been asked that you would not wish to answer?

A. Nothing that I would not wish to answer, but we had been out on a trip like this just the week end before and people had been ill, and he might have thought that Mr. Yeiser's death had something to do with monoxide gas as well, and it just seemed better to me—I just can't give you all of my reasons now that I had on my mind.

Q. Now, Mr. McKay, did you use this boat on any prior occasion when you and Mrs. Just were the only passengers?

A. I think I had; I think Mrs. Just and I went over to Ft. Meyers and spent the week end on the boat. I can't tell you exactly when it was, but it was sometime before this.

Q. Well, there was more than one occasion, when such took place, was there not, just you and Mrs. Just?

A. I don't think that Mrs. Just and I were out without Mr. Yeiser but the one time I am speaking about—maybe twice, but certainly not more than twice and I think only once.

Q. As a matter of fact, you and Mrs. Just  
86 were out at least three times?

A. Well how you mean?

Q. Well, what you mean?

A. No.

Q. In other words, the occasions that you were out, were on week ends?

A. Right.

Q. Were they occupying the whole week-ends?

A. No, go over Saturday and come back Sunday.

Q. Now, at that time, Mr. McKay, you were married, were you not, and still are?

A. Yes; separated.

Q. Separated from your wife?

Q. Yes.

Q. How long prior to these events had you been separated from your wife?

A. About a year—a little over a year.

Q. And you knew, did you not at the time that Mrs. Just was your companion on this vessel, that she had been divorced recently?

A. Yes.

Q. How recently did you understand she had been divorced?

A. About a year, I think, as well as I recall.

Q. Now, had you made trips with Mr. Yeiser on week ends on which you and he had been accompanied by other people?

87 Mr. Mayne:

I object to that; I think this is pretty far afield.

The Court:

What is the materiality?

Mr. Parmer:

If I do not disclose too much the purpose of my examination, the materiality is this: That this is a mental case, that is the only damages that I think they are asking for here is for the damage to the mind of Mrs. Just.

The Court:

We are not hearing damages now.

Mr. Parmer:

I know but I am bordering on the question of liability. I hope to prove on the question of liability something with respect to causation, and I hope to show eventually that whatever mental trouble Mrs. Just had was by reason of being associated, not only on this trip, but on prior trips, which in their nature by reason of what took place on the trips, was a matter of disgrace and it affected her mind to the extent—

The Court:

A matter of what?

Mr. Parmer:

A matter of disgrace. She had feelings of disgrace and as a result of it, she felt that because of that, her former husband who had been divorced from her, might regain the custody of her child. It seems that is one of the principal things that affected this woman's mind.

The Court:

Objection sustained.

Mr. Parmer:

Very well. I will approach the same thing in a different way which I think will meet with Your Honor's approval.

88 Q. Didn't you on this occasion, in accordance with your practice on others, provide Mr. Yeiser with women to accompany him on the boat?

A. No.

Mr. Mershon:

We object to that question, if the Court please.

The Court:

He has already answered it.

A. I never supplied Mr. Yeiser with women to go out on a boat.

Q. Did you speak to Mr. Yeiser about a certain book which you had in which were inscribed the names of a number of women?

Mr. Mershon:

I object to that; it is immaterial to any issue in this case and it is highly improper.

The Court:

I think it is immaterial and irrelevant; the objection is well taken.

Q. Mr. McKay, were the names of Mrs. Just and Miss Grunow in any book which you showed to Mr. Yeiser and to which you referred as your stud book?

A. No.

Mr. Mertens:

We object to that.



The Court:

Objection sustained.

A. No, I never referred to anything to Mr. Yeiser as a stud book. You are evidently familiar with that sort of thing; I am not.

Q. Well; I thank you.

A. All right.

Q. Well, Mr. McKay, was there liquor on the boat besides the brandy that you brought?

A. I don't know; I assume that there was.

Q. Well, as a matter of fact, don't you know  
89 there was liquor in a certain ice box on board the boat?

A. No, I don't; there may have been.

Q. Well, did you see any of the women, that is Mrs. Just and Miss Gruner, go to the ice box in order to get drinks, while you were aboard the boat?

A. I didn't, and I am morally certain they did not.

Q. Well now, when you say that you are morally certain, what do you mean?

A. I mean that I knew Mrs. Just and Miss Grunow quite well. I had seen quite a lot of Mrs. Just, and I have never seen her take more than one or two drinks at any one time. I have never seen her intoxicated. I have seen Miss Grunow several times, and I have never seen her take more than one or two drinks; in fact, I have offered them at times when I wanted more than one or two drinks but they would not take more than one or two drinks. The insinuation in regard to their drinking liquor was, to my mind, most untrue and unfair.

Q. Well now you have had your say.

A. No, you asked for it.

Q. Oh well I can take it.

A. So can I, old top.

Q. Let's see if you can. Now, Mr. McKay, what time did you come down to the vessel in order to bring Miss Grunow away from it?

A. About six o'clock.

Q. That again is your recollection now, about  
90 that?

A. No, I would not be entirely certain what time it was. I think I took her away at seven or eight.

Q. It might have been ten?

A. Could have been what?

Q. Ten o'clock?

A. What do you mean, might have been ten o'clock?

Q. It might have been ten o'clock at night when you came for Miss Grunow?

A. No, because I was taking her out to where she was staying, and it could not have been that late that I was taking her out there.

Q. You were sent for to take her, were you not?

A. I don't recall whether I was sent for or not. I wouldn't think—well, I just don't recall. I had expected to take her home all day.

Q. You say you expected to take her home all day?

A. Yes.

Q. Why didn't you come earlier?

A. Well, I don't know. I suppose I was busy; we took Mrs. Just to the hospital. I have an office here and was busy down there.

Q. When you say you expected to take her, do you mean that you expected someone to call you up and say when she was ready to go?

A. No, I don't think that I did.

91 Q. But you expected to go down and get her when you had time?

A. That is right.

Q. Now, as a matter of fact, when she left the vessel, wasn't she then under the influence of liquor in your company?

A. She was not. •Figure it out. I took her directly to Mrs. Just's aunt, who was living there on the Beach, and I would not take a girl in there,—visiting girl—drunk. I would have left her on the boat, if something like that had happened.

Q. Well, now, the night before the morning when you arrived in Miami and while you were playing bridge, did you have any liquor?

A. We did not.

Q. Now at the time when you were playing bridge, you were doing that in the salon—no alcoholic implication intended—just beyond the Captain's bunk, were you not?

A. Right.

Q. Did you have any glasses on the table?

A. We probably did; we usually had some sort of soft drinks.

Q. Such as?

A. Coke, ginger ale, orange juice and limes—no alcohol—no alcohol in Mr. Yeaser's presence or in my presence on that boat there—you seem to forget—

Mr. Farmer:

Please may we have the witness admonished to please answer the question.

92 The Court:

Mr. McKay will have an opportunity to supplement that. You will be allowed to make a supplementary statement on your own motion or by questions by Mr. Mershon.

Q. Now, Mr. McKay, at the time that these girls were brought from the boat, you didn't think that either one of them was seriously injured, did you?

A. At the time they were brought from the boat, I was worried about Mrs. Just, because she had to be taken to the hospital.

Q. And, therefore, you expected a very quick recovery, did you not?

A. I did. Up to that time I thought carbon monoxide gas was just like you didn't get enough oxygen, and did not know it was poisonous.

Q. Well, now, at any of the meals was liquor served?

A. It was not.

Q. When I say "liquor", I do not necessarily mean whiskey or gin. Was any wine served?

A. No wine or beer served.

Q. Now that Sunday night. At the evening meal, do you deny that champagne was served at that meal?

A. I most certainly do.

Q. Do you remember when you were out in a small boat fishing, that on one of the days when you were fishing, there was a bottle of wine brought along?

A. I do not.

93 Q. Do you remember that one of the women drank it, or drank part of it, and became ill?

Mr. Mayne:

I object to that as being immaterial; whether she did or not. The question is whether these girls received this monoxide gas on this boat; that is the issue we are trying out and not whether they were drunk on a day previous. It is what happened on this particular morning, or the night that we are interested in, and nothing that transpired prior to that time. Now, I do not think we can go into the morals of these girls. Assume that everything that Mr. Parmer has stated to Your Honor is true, which is not true, it does not make any difference.

The Court:

Objection overruled.

Mr. Mayne:

Exception.

Mr. Mershon:

Do we understand that exceptions follow all adverse rulings?

The Court:

Yes. They will be so noted.

Mr. Parmer:

Read the question, please.

(Thereupon the preceding question was read by the Reporter as above recorded.)

A. I do not. I remember one of the girls became ill, but my understanding was that it was from seasickness.

Q. Which one was that?

94 A. I think Mrs. Just. They were both a little bit ill; I think Mrs. Just was the one who was the most ill from seasickness; we went out fishing in a very rough bay and a very rough day, and that is nothing unusual.

Q. Well the effects, you say, were from seasickness?

A. Yes.

Q. When did that occur?

A. I think it was Sunday evening.

Q. Did you observe Mrs. Just's complexion at the time you thought she was seasick?

A. No, when she mentioned being uncomfortable we immediately turned around and came in.

Q. Did she vomit?

A. My recollection is that she did.

Q. Now then that meal that occurred after she came in on Saturday night that I am asking you about, when I am asking you about champagne—

A. I understand that.

Q. And you say—

A. There was not any served.



Q. At any of the other meals was wine served?

A. It was not.

Q. Now, Mr. McKay, do I understand you correctly that during Saturday and Sunday and up until the time that the boat arrived in Miami, the only drink that you had was a small amount from this brandy?

A. That is right.

95 Q. And the only drink?

A. I might have had two small amounts.

Q. And in the case of the girls, the only drink they had was out of the same brandy bottle?

A. That is right.

Q. That is the only drink that you saw them take?

A. That is the only drink that I saw them take.

Q. When did you first miss your comb?

A. I don't recall; I imagine Saturday night, or Friday night, before dinner.

Q. Well, Mr. Yeiser had more than one comb, did he not?

A. I don't know.

Q. Did you ask him?

A. I don't know; his cabin was on the floor above, and the girls' cabin was right down the hall from where I was.

Q. Now you got the comb first on Saturday morning?

A. I don't know whether I got it Friday night—I probably got it Friday night. I wouldn't know.

Q. What were you doing between Friday and Monday morning trading this comb back and forth when anybody wanted to comb their hair?

A. They took it out of my room at least once or twice, and I got it out of their room.

Q. As far as you know, there was but one comb for the three of you?

A. No, I think there were two or three combs in their room.

96 Q. Was there any necessity for having the comb to go back and forth if there were three?

A. I don't know if there was any necessity but it was done.

Q. Now, Mr. McKay, what I want to know, on that morning was it really the comb that you were trying to get in that room, or was it liquor?

A. It was a comb; it was not liquor.

Q. I want to know, Mr. McKay, if the liquor—some liquor—was not kept in that room, where anybody could go and make a drink?

A. There was not to my knowledge.

Q. Well, now, Mr. McKay, in your opinion don't you know that that is a familiarity in dealing with women that is generally observed?

Mr. Mayne:

I object to that as being immaterial.

Mr. Mershon:

Let him answer it; he can answer it.

The Court:

I think it is immaterial. The objection is sustained.

Q. Were you accustomed to enter that room on other occasions while the women were in bed?

A. I think that was the only time.

Q. What was that?

A. That is the only time I was in there.

Q. Just when you were looking for the comb?

A. Will you let me finish my answer before. You broke in.

Q. I beg your pardon; you had not finished?

97 A. I think that was the only time I was in there when they were in bed and I never went in without knocking.

Q. When they did not awaken on this occasion, you went in with the intention of waking them?

A. I looked in and saw that they were in bed and covered; and then I went in.

Q. Did you think it was time for them to get up?

A. It wasn't very late; it wasn't time for them to get up, but I thought they would be awake.

Q. But as they appeared to you; they appeared to be sleeping, did they not?

A. They did.

Q. Did you think it was strange that a sleeping person should not answer you when you spoke to them?

A. Yes, I took it—

Q. In other words, you expected them to be wakeful after that time?

A. I don't know what I expected; I opened the door and walked in for the comb.

Q. You say you saw these women sleeping there and you expected them when you spoke to them, to speak back, is that what you mean?

A. When I spoke to them I expected them to speak back.

Q. Although they were sleeping?

A. No, I expected my speaking to them would awaken them.

Q. In other words you intended to awaken them?

A. I intended to.

98 Q. Because you thought it was time for them to get up?

A. No, not because of that.

Q. What was the reason you wanted to awaken them?

A. I wanted to say good morning, that was all.

Q. I see.

A. I am glad you do.

Q. Now, Mr. McKay, on the evening before, is it not a fact that you did not leave the salon until in the neighborhood of one o'clock?

A. No, that is not a fact.

Q. Mr. McKay, you say you occupied the starboard state room?

A. Right.

Q. Don't you remember that while you were on the vessel you expressed yourself as being unable to understand why you had not been affected by carbon monoxide gas because you were sleeping on the port side of the vessel?

A. No. I could not have said that.

Q. As a matter of fact, were you not sleeping on the port side of the vessel?

A. No, I was sleeping on the starboard side.

Q. Did you talk to Mr. Balch about this matter at any time after it happened?

A. I talked to him over the telephone. I don't recall whether I have seen him since then or not. If I had seen him, undoubtedly it would have come up in our conversation.

99 Q. You appreciate, do you not, Mr. McKay, that the hole which was afterwards found in this exhaust pipe here, was right under your cabin?

Mr. Mertens:

We object to that question on the ground that there is nothing in the record to show that that is true.

Mr. Mershon:

As a matter of fact, it is not true.

Mr. Parmer:

I am not offering that as proof of a fact. I am offering it as proof of this man's understanding with respect to his statement that he was on the starboard side of the vessel, and I expect to prove that he was on the port side.

The Court:

You asked him a question that assumes a fact which is not proven in evidence. The objection is well taken.

Q. Mr. McKay, how long after the two girls were brought out on deck did Dr. Howell come?

A. I would say three-quarters or an hour—that is 15 or 20 minutes after they were brought on deck—then I would say it was half an hour before Dr. Howell got there.

Q. Were you present when the girls were brought out of the stateroom and up on deck?

A. Yes, I was.

Q. Were they in their night clothing at that time?

A. They were.

Q. Did you observe anything with respect to the night clothing, as to whether it was wet or dry?

A. If it had been wet I would have noticed  
100 it, because they were laid down on the after deck.

Q. Do you think that you might have forgotten that?

A. No, sir.

Q. Now, as a matter of fact, Mr. McKay, were not the night gowns of both women wet?

A. No, they were not.

Q. Now, you say while Dr. Howell was there, he gave an injection in the arm of Mrs. Just?

A. I don't recall whether he gave it or the nurse gave it.

Q. How close were you to Mrs. Just when that was done?

A. I suppose five or six feet away.

Q. How long did you remain on the vessel after that was done?

A. I am not exactly sure; I went up to the office sometime during the morning, and then came back



again, and I imagine I remained there half an hour to an hour.

Q. Well, then, if we remember what you have stated with regard to Dr. Howell's coming, and the time you remained there after the boat docked, would that mean that you left about fifteen minutes after he arrived?

A. No, I don't suppose that I left that soon after he arrived.

Q. Tell us how soon after he arrived did you leave?

A. I don't know.

Q. How long were you gone?

A. I don't know, I imagine half an hour to an hour.

Q. Now, you say Miss Grunow recovered consciousness at about one o'clock in the afternoon?

A. I think earlier than that.

Q. What time would you say?

101 A. I would say around noon time.

Q. Around noon time?

A. Yes. It might have been one o'clock; I don't know the hour, but my impression is it was earlier.

Q. Now, when you refer to unconsciousness, do you mean a person is absolutely out?

A. Right.

Q. Don't you remember Mr. McKay, that Miss Grunow was talking long before that in the morning?

A. No, I don't. I remember when she came to, she said "hello", and recognized Mr. Yeiser and myself.

Q. That took place at 12 o'clock?

A. Well I don't know exactly when it took place.

Q. Well around 12 o'clock?

A. That is my best recollection.

Q. Now, see if your recollection can go so far as to what took place when the doctor first came there, with respect to Miss Grunow. Don't you remember that she was talking shortly after the doctor was there?

A. No, I don't.

Q. Where was she when the doctor was there?

A. She was later moved into the bed in Mr. Yeiser's cabin, but I don't think she was moved in there until the doctor had been there; I am not exactly clear on when she was moved in there; I think it was after she had recovered somewhat.

102 Q. It was while the doctor was there and you were there at the same time that she was brought into Mr. Yeiser's room?

A. I won't be sure about that. I was there when she was brought into his room, I know she was in there later in the day and I am not clear when she was moved in there.

Q. Now, you visited Mrs. Just while she was out at the hospital?

A. I did.

Q. On what date? The following day?

A. I don't recall what day; I assume on the following day.

Q. Well before Mrs. Just went to the hospital, did she talk at all?

A. No, not in my presence.

Q. Did she have her eyes open?

A. My recollection is only as the doctor pried them open.

Q. When you first saw her in the hospital, did she have her eyes open?

A. No, she did not.

Q. Did you speak to her?

A. I don't recall; I imagine I tried to speak to her several times during the day to see if she would recognize my voice, and she didn't.

Q. Well, didn't she recognize you while you were on the ship?

A. No, I am quite certain she did not.

Q. Now, you say that while she was at the hospital later than the occasion about which we have just referred,

103 you did talk to her so that you came to the conclusion that she recognized you?

A. The later days?

Q. Yes.

A. Yes.

Q. And later on after she left the hospital, sometimes she would remember things and sometimes she would not?

A. Right.

Q. Some of the things which had happened on the trip, and some of the other things she wouldn't?

A. Well, she didn't remember—yes, that is true for a time; there were times she didn't seem to remember any of the trip.

Q. And the other things she would remember?

A. Later on her memory would bring back parts of the trip.

Q. How long after she went to her place of abode in Miami was it before you visited her?

A. You mean from the hospital?

Q. After she left the hospital?

A. I don't recall the date she went home, when she came home from the hospital; I don't know whether I was back—I went up to Cincinnati with Mr. Yeiser's body; I don't know when she went home with reference to that trip; she went home while I was up there.

Q. But you state it was shortly after she left the hospital, or shortly after you came home from Cincinnati?

A. Yes.

104 Q. Within two or three days of either event, is that correct?

A. That is correct.

Q. Thereafter you continued to visit her?

A. Yes.

Q. Regularly?

A. Regularly.

Q. As long as she stayed in Miami?

A. Yes.

Q. And since she has returned to St. Louis, have you corresponded with her?

A. I think I wrote her one letter; her mental condition was not such that I knew whether to write or not; I believe I wrote her one other letter.

Q. How long after the events with which we are particularly concerned was it that that happened?

A. That was about seven or eight months afterwards.

Q. I take it that this is all of the correspondence?

A. That is all.

Q. How long have you known Mr. Mayne?

A. I would say about nine years.

Q. You have known Mr. Mayne in Miami, have you not, when he has been here?

A. Well, I have known him in St. Louis and other spots.

Q. And other occasions?

A. And other occasions, and Mr. Mayne introduced me to Mrs. Just.

Q. Oh, he did?

A. Yes.

Q. And you introduced her to Mr. Yeiser?

105 A. That is right.

Q. And also Miss Grunow to Mr. Yeiser?

A. That is right.

Q. Now, Mr. McKay, who was it that first said anything about carbon monoxide gas, you or Mr. Yeiser?

A. I can't remember for certain; we discussed it together.

Q. It might have been you who said it first?

A. It might have been, but Mr. Yeiser's engineering—

Q. Wait a minute. That is an answer.

Mr. Mershon:

I think he is entitled to finish his answer.

Mr. Parmer:

I asked him a simple question; he can answer it yes or no; it needs no explanation.

The Court:

He can make an explanation if he wants to.

Mr. Parmer:

Very well, if he wants to make an explanation of his answer, that is allright.

A. It might have been me but it was probably Mr. Yeiser, but I always deferred to him any engineering matters; he had some engineering training.

Q. Now at the time he was discussing this with you, wasn't he, as a matter of fact under the influence of liquor?

A. No, he was not.

Q. You were pretty well acquainted with his habits with regard to consumption of liquor, were you not?

A. Yes.

Q. How much liquor would that man take in a day, sir?

A. I don't know.

106 Mr. Mayne:

I object to that; it doesn't make any difference; it is immaterial in this case how much he took; it does not make any difference how much Mr. Yeiser took; so far as these girls are concerned, it is certainly immaterial whether Mr. Yeiser was drunk all of the time. It doesn't make any difference.

The Court:

I think that is proper cross examination.

Q. Tell me, Mr. McKay, if you can answer that question.

A. How much liquor he drank a day?



Q. Yes:

A. I don't know.

Q. Well had you been on any trips alone with him?

A. How much do you drink in a day?

Q. I would have no hesitancy in telling you if it were relevant, but I want to know from you, since you were so close to Mr. Yeiser, and were on the boat with him so often, and since he was a known alcoholic. I want you to tell us how much you know that he drank a day?

A. Well, you see if he drank any liquor when I was aboard, he sneaked it, because he did not do it with my consent, and I would not go aboard the boat until I had a promise from him each time that he would not drink on that trip.

Q. And each time you received the promise readily and it was given, it would be violated.

A. It wasn't always violated.

Q. But frequently?

A. Frequently, yes.

Q. And was this particular trip with the two  
107 women, Mrs. Just and Miss Gruner peculiar so far as Mr. Yeiser was concerned, in that he did not drink very much liquor on that trip, whereas on most other trips he did?

A. No, he did not, in the first place. On some trips he did. On this trip he undoubtedly drank some but he was not under the influence of liquor on this trip.

Q. Had you seen Mrs. Just take a highball at any time when she was over on that vessel—whiskey?

A. I never have. Wait a minute. Now, don't smile sarcastically.

Q. It is my sanguine countenance. It is not a smile.

A. Don't smile sarcastically, and I will tell you; certainly not over two and probably just one.

Q. Tell me, Mr. McKay, when you arrived on the boat on Friday, you came in an automobile, did you not?

A. I imagine I did.

Q. And what luggage did you have?

A. I don't recall.

Q. Did you have any baggage besides a suitcase?

A. Not that I know of, my luggage was put on, you see, when I came over from the house in the morning; it was a soft airplane bag, I think it was; I don't know.

Q. You say that is all you had; did you have any packages of liquor?

A. No, why don't you ask me?

Q. I just asked you about packages and you seemed to be terribly upset.

108 A. I know very well I didn't.

Q. Mr. McKay, when you saw these girls down there, did you notice that their lips were blue?

A. I can't say that I did.

Q. Did you notice that the finger nails of either girl were blue?

A. No, I didn't notice.

Q. When I say the "lips were blue", I mean the corners?

A. No, I didn't. I probably did not notice details.

Q. What is that?

A. I say I probably did not notice details.

# Re-Direct Examination.

By Mr. Mershon:

Q. At this time I will ask you to note, and with the Court's permission, I will ask you to write the respective names of Mrs. Just and Miss Grunow on these photographs, Exhibits 7 and 8, and say which of these respective bunks were occupied by Mrs. Just and Miss Grunow when you found them on that morning?

A. On the reverse side?

Q. No, on the bunk itself; right here. (Indicating.)

A. (Witness indicates on Photograph.)

Mr. Parmer:

On Exhibit 7 the witness writes the name "Mrs. Just", and on Exhibit 8, the witness writes the name "Miss Grunow." I will now ask you to indicate where their feet were; just write the word "feet".

(Witness complies.)

109 Q. Are the so-called bunks simply single iron beds with box springs and mattresses?

A. They are single; I won't be sure that they are iron, but they are single.

Q. Have you ever on occasions when you made trips with Mr. Yeiser, you and he alone, occupied that state room?

A. No, Mr. Yeiser and I never occupied it, I don't believe; I occupied it many times.

Q. On what occasions?

A. When I had been there alone, and when I wasn't there with other guests. I occupied the state room alone. I think I had three fellows with me that occupied it; all three of us occupied it.

Mr. Mershon:

With consent of opposing counsel, I mark on these respective photographs the words "starboard" and "port", the word "starboard" being on Exhibit 8, and the word "port" being on Exhibit "7", to indicate the respective sides of the yacht on which these bunks were located.

Q. Mr. McKay, was Mr. Yeiser mentally incapacitated?

A. No, I don't think so.

Q. What of him with respect to his mental ability, business training, etc?

A. Oh, he was one of the brightest men I ever knew; at 33, he was president and General Manager of Globe-Werneke Company in Cincinnati. He was one of the

brightest men in my section in the army, and I had good reason to know. He stood third in the section of 110 60, and used to go to bed at 9:30 every night. I stood near the bottom and I worked until twelve every night; he was a bright man.

Q. Did he retire then from business?

A. He retired from business.

Q. What experience, if any, had he had beyond aviator or automobile driver or engineer?

A. He was a balloon pilot; that required work in motors; he knew about that before; he was also a licensed airplane pilot.

Q. What, if anything, did he know about a boat?

A. He had made a study of boats; at the time of his death, he was taking a correspondence course so as to get master's papers; he had some first papers, or whatever they call them.

Q. Had he had any airplane accident which affected his limbs or nerves?

A. He had two or three smashes which had hurt his legs, and thereafter when he would drink, it would seem to affect his power of locomotion.

Q. Were his legs or his ability to use his legs affected by taking liquor before he would become drunk?

A. Yes, before he would become mentally bothered by it. Is that what you mean?

Q. Yes, that is what I mean; then it would affect his mind and it would affect his legs?

A. Greatly so.

Q. How would it affect his legs? Would he have difficulty in using them?

141 A. Yes, difficulty in walking; he would need support in walking, I would say to the extent like a fellow with locomotive—

Q. Locomotive ataxia?

A. Yes.

Q. Do you recall this morning when you saw the girls in their bunks and you could not wake them up, and you went up and found Mr. Yeiser by the wheel house?

A. Right.

Q. Did he walk back with you, and go down to the bunks?

A. He did.

Q. Did he have any difficulty in walking back with you and coming down the steps to the lower bunk and going to the bunks?

A. He did not.

Q. Was there any indication that he was intoxicated, drunk, or under the influence of liquor at that time?

A. Not at that time.

Q. Was there any indication of any kind that the girls were intoxicated or under the influence of liquor when you found them in their bunks, and when they were brought out on the deck?

A. No.

Q. Was that one of the things that you and Mr. Yeiser considered in determining that it was carbon monoxide poisoning?

Mr. Parmer:

I object to that, as leading.

112 Mr. Mershon:

This is cross examination—direct examination under the guise of cross examination, if your Honor please.

The Court:

I think that it is leading.

Mr. Mershon:

I will agree with your Honor that it is subject to that objection. I will reframe it.



Q. Did you or Mr. Yeiser in discussing what was the matter with the girls consider any possibility other than carbon monoxide gas?

Mr. Parmier:

I object to that as beyond the ken of this witness, what Mr. Yeiser considered.

The Court:

Well, the purport of the question is what was considered by Mr. Yeiser and has reference to the conversation between the witness and Mr. Yeiser. Ask him what was taken into consideration in their conversation.

Q. Will you answer that question of the Court.

A. We deducted that it must be carbon monoxide. I said that—my thought was that it was simply insufficient fresh air, then after talking with Mr. Yeiser, carbon monoxide was in both of our minds.

Q. Did either you or Mr. Yeiser suggest that the girls were under the influence of liquor?

A. We did not.

Mr. Parmier:

I object to that, your Honor; it is leading.

The Court:

Well some questions necessarily border on being leading; the objection is overruled.

A. We did not, and there was no reason for it.

113 Q. And while you were out fishing with the young ladies, did you and Mrs. Just go in one boat and Mr. Yeiser and Miss Grunow go in another boat, or did you all go together?

A. We all went together part of the time and we went in separate boats part of the time; Mrs. Just and I went

once, and I think Miss Grunow and I went over one morning on the bank and fished.

Q. When you split up like that, state whether or not somebody else was along?

A. There was always someone else along. Captain Roberts usually took one of the fishing boats, and another fishing guide took another; if he wasn't there, Chief Blount would take it, and a sailor usually would go along with one of us.

Q. I believe you stated that on this Sunday afternoon, that Mrs. Just and probably Miss Grunow, both, were a little seasick?

A. Yes.

Q. While they were out in the small boats?

A. Yes, it was quite rough; there wasn't any use putting it through it, so we turned around and came in.

Q. Did they completely recover from that before dinner?

A. Absolutely.

Q. Now, Mr. McKay, when did Mr. Yeiser start drinking, which resulted, in about three days, in his death, do you know?

A. The Monday that we returned.

Q. Was that before or after you got into port?

A. After we got into port.

114 Q. Do you know from anything he said or did, what caused it?

A. I don't know.

Mr. Parmer:

I object to that, insofar as it includes what he said.

Mr. Mershon:

From what Mr. Yeiser said or did.

The Court:

Objection is made to that?

Mr. Parmer:

Insofar as in includes the words what Mr. Yeiser said.

The Court:

The objection to the question is well taken.

Q. Do you know why Mr. Yeiser started drinking after this accident which ended in his death, if so, please state.

Mr. Parmer:

I object to that, but I would have no objection to a question which asked Mr. McKay whether anything was done by Mr. Yeiser which would indicate why.

The Court:

Read the question.

(Thereupon the preceding question was read by the reporter as above recorded.)

A. I would have to preface anything I said by what he told me or I assumed.

The Court:

Allright, that is objectionable; that has been ruled upon by the Court. Apparently, he can not answer the question.

Q. Did Mr. Yeiser show any signs of distress over this accident?

A. He did.

Q. What did he do?

115 A. He talked about it incessantly; he said many times how sorry he was. He appeared nervous, and later started drinking.

Mr. Mershon:

That is all.

The Court:

Well, it is about time for us to conclude for the day. Mr. McKay is the witness, and he can come back in the morning. We will adjourn until 10 o'clock tomorrow morning.

October 6th, 1937. 10 o'clock a. m.

Morning session.

The Court:

Did you complete your examination, Mr. Mershon?

Mr. Mershon:

I want to ask Mr. McKay two or three other questions, if your Honor please.

JOHN G. MCKAY a witness on behalf of Claimants, being recalled, and being still under oath, further testified as follows:

Re-Direct Examination (Continued)

By Mr. Mershon:

Q. Mr. McKay, after Mr. Yeiser's death did you as counsel, or did your firm represent his Estate?

A. Yes, we did in some matters.

Q. Did you represent it in connection with the sale or disposition of the yacht Friendship II which was in this Estate?

A. No, we did not.

Q. You were asked on cross examination whether your practice and that of your Firm consists largely in defending negligence cases, and I believe you said it did?

A. Yes, quite largely.

116 Q. Is that what is generally known as insurance practice, where you represent companies which offer defenses for their assureds?

A. We represent the Companies who offer defenses for their assureds who carry liability insurance.

Q. Mr. McKay, on your cross examination you were asked numerous questions of a very personal nature, and at which time you requested the Court for permission to make a statement of explanation regarding your friendship and relationship with Mr. Yeiser and also with these claimants, Mrs. Just and Miss Grunow, which explanation counsel for the petitioner here said was not necessary in response to his question. Do you now wish to make a further or supplementary statement on that subject?

A. I would like to. May it please the Court, in regard to Mr. Yeiser, I had known Mr. Yeiser, as it came out in the testimony here, for some 20 years. We were the closest of friends; he was a gentleman at all times. He did drink too much, and when he drank too much he was not himself. Other friends of his and myself spent a good deal of time in trying to get him back so he would be himself all of the time. He came down here and his friends in Cincinnati looked to me—I have files of correspondence from his friends and from his family about attempts made to get him so he would not drink. He seemed to

117 like to have me go with him on various trips on this boat. I went numerous times. At no time did I ever take a drink on the boat with him or take a drink in his presence. I protested against it. He did on a few occasions take drinks in my presence, but very seldom, and I therefore thought it was a good thing—if I could spare the time on a week-end, to take trips with him, because he was delightful company and we had a lot of fun "bulling" over old wartimes. That was the reason for the trips in general.



Any reflection on Mr. Yeiser about asking me to procure women for him goes out as a matter of course, or that I would hope would go out as a matter of course.

There has been an attempt made here to besmirch the character of very good friends of mine, Mrs. Just and Miss Grunow. I know Mrs. Just and have known her for almost three years; I know her family, her mother, her aunt and her grandmother, and I know friends of theirs in St. Louis; they are among one of the finest old German families in St. Louis. There are a great many people who come down here from St. Louis that I have known for 9 or 10 or 12 years, and I found that they all knew Mrs. Just and her family, and they say she is of a fine family. On the other hand, Mrs. Just down here always conducted herself perfectly, as a perfect lady; she was careful in her conduct. As far as drinking is concerned, I have been on parties with her and dinners, with many people present, and many times there were invitations from her

118 friends or invitations from my friends, yet I have never seen her under the influence of liquor. I was introduced to her by Mr. Mayne here, about whom you know something. Miss Grunow I did not know as well. She came here on a trip for three or four weeks and she was a friend of Mrs. Just and she conducted herself just as well as Mrs. Just when here.

In view of these attempts to besmirch the character of my friends, I felt that I had to speak to the Court about it.

Q. Then, I understand, Mr. McKay, that your association with these ladies was not solely on the trips that were taken on this boat or any other boat?

A. Far from it.

Q. And the trips that were taken on the boat by you and by these ladies were at Mr. Yeiser's invitation as an invitation to his friends and your friends to share his hospitality?

A. Right.

Mr. Mershon:

That is all.

# Re-Cross Examination.

By Mr. Parmer:

Q. Well, now, Mr. McKay, when this boat came into Miami, after the trip, did you tie up at the Royal Palm Dock?

A. Yes.

Q. Do you know where the Jackson-Memorial Hospital is in relation to the Royal Palm Dock?

A. Yes, sure.

119 Q. How far away?

A. I would say about ten to twelve miles.

Q. Wasn't it at your suggestion, Mr. McKay, that Mrs. Just was taken to the St. Francis Hospital?

A. Yes, I think it was.

Q. Well, do you remember that it was.

A. I won't be sure but I think it was at my suggestion, because it was right near her home on the Beach, which would be more convenient for her family.

Q. As a matter of fact, didn't you say to Dr. Howell that you wanted Mrs. Just taken to the St. Francis Hospital because if she was taken to the Jackson-Memorial Hospital, the newspapers might get hold of it and make it nasty for the girls and their families?

A. I don't think so.

Q. Will you deny that you said that to Dr. Howell?

A. I am quite certain that I didn't.

Q. You remember that Dr. Howell had protested—

A. May I make a suggestion?

Q. Very well, if you had not finished.

A. I had not finished.

Q. Allright.

A. We all know that newspaper notoriety about people being overcome by monoxide is something no one would

want. I have no great influence at St. Francis, and I have none at Jackson-Memorial. I can not imagine myself making such a statement.

120 Q. Do you remember that Dr. Howell wanted to take them to the Jackson Memorial Hospital because that was the hospital he ordinarily used?

A. No, I don't.

Q. And that he protested—

A. I don't remember that, but I can easily imagine that I might have insisted that Mrs. Just be taken to the St. Francis Hospital because it was just two or three blocks from where she was living on the beach and where her family were.

Q. Do you say that you were aware that under the circumstances like these, that the press might get hold of the case and make it nasty for the family?

A. Certainly.

Q. Do you think that you did not express yourself that way at the time, to Dr. Howell?

A. I don't recall; I may have, but I don't recall.

Q. Then you think that you might have expressed yourself to him then?

A. Yes.

Q. Well, was it your idea that the press might make something nasty of just carbon monoxide gas?

A. I thought they might.

Q. Well, were you conscious of any circumstances which would afford them the foundation for something nasty?

A. No.

121 Q. But you perceived that they would, under the circumstances, get something, by reason of which they might print something that was nasty, but untrue?

A. Yes.

Q. In other words, you were not at all deceived by appearances yourself, that is the appearance might be against you?

A. I suppose that is what I had in mind.

Q. Is that true?

A. I suppose so.

Q. But your position is, and was at the time, I take it, that you wished to avoid the press making something untrue, although it might appear otherwise?

A. I suppose that is true.

#### Re-Direct Examination.

By Mr. Mershon:

Q. Mr. McKay, the St. Francis Hospital is a fine, large, well equipped institution at Miami Beach, is it not?

A. I understand it is the finest equipped hospital in the area.

Q. Were you as familiar with the facilities of the Jackson-Memorial Hospital as you were, of the St. Francis Hospital?

A. No, I had been to St. Francis oftener.

Q. If you were to make a decision today for your family or your friends, for hospital care, would you hesitate to make the same decision, from your own personal standpoint, that you made for Mrs. Just at that time?

Q. If I had a sister who lived in Coral Gables and was taking her to a hospital, I would suggest and insist that she go to the St. Francis Hospital.

122

#### Re-Cross Examination.

By Mr. Parmer:

Q. Well at that time did you know much about the Jackson-Memorial Hospital?

A. I knew something about it, yes.

Q. Did you know anything about it by reason of which you would not recommend it for the treatment of such an illness as you thought Mrs. Just had?



A. No, I wouldn't recommend it, if there was something better to recommend.

Q. Perhaps you can tell me—I don't want to interrupt if you haven't finished—

A. Unless there was some other place I thought would give a little better treatment.

Q. Tell me if I am wrong. Isn't the Jackson-Memorial Hospital one of the very leading hospitals in the south?

A. Well probably one of the leading. The equipment at the St. Francis, you may or may not know—

Q. I don't—

A. —This hospital was equipped by Mr. Allison, and he gave instructions that absolutely no expense be spared in equipping it; it was not organized and has not been operating as a profit institution, and the equipment in the

St. Francis is about the best possible to obtain  
123 in the world.

Q. How did you learn of that?

A. I represented Mr. Allison, as counsel for him, right after he made the arrangement for the hospital; I wasn't here when he made the arrangement.

Q. But you represented him?

A. Yes.

Q. Then you are familiar with that hospital?

A. That is right; after that time, Mr. Allison died and because of collateral representation, I did not represent all of his Estate. I am not at all familiar with the arrangements—not at all familiar, but I know something about the arrangement under which the hospital was turned over to the Order of St. Francis.

Q. You have a far less knowledge with regard to the Jackson Memorial Hospital?

A. Oh surely.

Q. If it were your idea to keep from the press knowledge with regard to the circumstances under which Mrs. Just was removed from the vessel, you would have a



greater opportunity of doing it in the St. Francis then you would have had in the Jackson-Memorial, is that so?

A. If it were important?

Q. Of course.

A. If it were the chief thing; the chief thing was to get her well under the best condition we could get her well, and where she could be near and be visited by her family.

Q. Was it at all your idea to get her to the  
124 hospital as fast as possible?

A. Oh yes.

Q. Although the St. Francis was ten miles away and the other hospital five miles away, yet there were other circumstances which countermanded the necessity for speed?

A. No, there wasn't ten minutes difference in the time to get to the St. Francis from there, and there had been several hours elapsed, and the doctor said there was no great hurry but she should go to a hospital.

Q. There was no necessity for speed, then I take it, since the doctor said "no hurry"?

A. No necessity for speed to save ten minutes when there was a better place to go.

Mr. Mershon:

That is all. Would the Court like to interrogate the witness?

The Court:

The Court hesitates about questioning witnesses in the early stages of the trial; counsel know their case, but I am going to suggest two phases of inquiry I would like to have developed. It is perfectly agreeable to the Court if counsel would develop them. The first is: Whether there was any odor or any foreign substance in the state-room when Mr. McKay first found the ladies, and along that line whether any investigation was made by him to explain the presence of any odor or any foreign gas or

125 substance, if it was found. In the second place, whether in his talk with Mr. Yeiser in regard to the condition of the ladies, whether any facts were investigated besides their opinion—as to whether there was anything that developed in the way of facts during the ten or fifteen minutes that elapsed before the boat tied up at the dock.

Mr. Mershon:

If your Honor please, I will undertake to interrogate Mr. McKay along those lines.

The Court:

All right.

(By Mr. Mershon):

Q. Mr. McKay, when you went in the stateroom on the morning in question and found the ladies unconscious in their bunks, was there any odor of alcohol there?

A. There was not.

Q. Did you notice any peculiar or unusual odor?

A. I did not.

Q. Did you see any evidence of alcoholic liquors of any kind, either in glasses remaining about the state room, or in bottles?

A. I did not.

Mr. Mershon:

Just at this point, I will state to the Court that it will be shown, and I think counsel will concede, that carbon monoxide gas is colorless, and generally regarded as an odorless substance.

The Court:

That I do not know.

Mr. Parmer:

Yes, I will concede that carbon monoxide gas is as Mr. Mershon says, but the fumes from a motor in which it is contained in a minor quantity, are not colorless.  
 126 I hope I have not said enough to bring forth an answer which will void what I have said, because that is part of our case; fumes from a motor can be seen.

Mr. Mershon:

In view of counsel's statement, and regardless of what he understands, Mr. McKay will tell the truth as he knows it and recalls it, and I think we owe the duty to the Court to have him state whether he saw any smoke or anything unusual in the stateroom.

A. I did not. In fact Mr. Yeiser and I sniffed to see if there was; to see if we could notice any odor, and we did not.

The Court:

In the state room?

A. In the state room.

The Court:

When was that? Before the ladies were removed to the deck?

A. Before they were removed to the deck, and up to that time you see I had opened the windows of the state room.

Q. Mr. McKay, prior to that time you had opened the windows on each side of the state room?

A. Yes.

Q. Before Mr. Yeiser came down?

A. Before he came down; that was the first thing I did.

Q. Did you also leave open the door from the state room, opening out into the hallway?

A. Yes, I did.

Q. I believe you stated your first impression  
127 when you got down to the ladies, was they had  
been sleeping with the windows closed and the  
door closed, and perhaps they had not had sufficient supply  
of oxygen?

A. Right.

Q. Now state if you can recall any statements or discussion by Mr. Yeiser of facts which he might already have known concerning the condition of the boat and its motors, or otherwise, which would make the possibility of carbon monoxide gas having affected these ladies?

A. I do not recall that he stated any facts on which he based his conclusion that it was carbon monoxide gas but I do recall—

Mr. Parmer:

Your Honor, I think that the answer so far given answers what your Honor was interested in, in regard to the facts and I am fearful that Mr. McKay wishes to make a statement not relating to facts, and if he wishes to go outside of the facts, I will necessarily object.

Q. Stop your answer at that point, Mr. McKay, and I will ask you another question. Did you and Mr. Yeiser make an investigation to try to ascertain whether there was any other possible basis for this condition the ladies were found in, such as sniffing and looking for liquor?

A. We did not look for liquor; we knew there wasn't any; we sniffed and that is the only investigation we made.

Q. Were you both aware of the total absence of any alcoholic fumes or smell of alcohol?

128 A. We were.

Mr. Mershon:

If your Honor please, it is entirely agreeable to us to have the Court ask any question he may have in his



mind. Counsel here is fearful that we may violate the rules of evidence, and I feel a certain hesitancy about going further, although I could do it.

The Court:

I think you have covered it sufficient to meet the suggestion of the Court. Mr. McKay is right here, and if we desire to recall Mr. McKay, we can do it.

Mr. Parmer:

May I ask Mr. McKay just one question?

The Court:

Yes.

(By Mr. Parmer):

Q. Mr. McKay, there was a certain period during which you were in the room before the windows were opened?

A. Yes.

Q. How long was that?

A. I would say two or three minutes.

Q. Two or three minutes?

A. Yes.

Q. And during that time, was the door closed too?

A. No, the door was open.

Q. The door was open?

A. Yes.

Mr. Parmer:

That is all.

129 Mr. Mershon:

It is stipulated by counsel for the respective parties that the series of papers consisting of 12 sheets which have been marked for identification as Claimant's Exhibit 9, partly printed, partly typewritten, and partly handwriting, constitutes the original and complete hospital



record of St. Francis Hospital of Miami Beach, Florida, of the occupancy of Mrs. Charlotte Just as a patient in that hospital from and including March 2nd, 1936, to and including March 7, 1936, and of the hospital and medical treatment of the said patient, Mrs. Charlotte Just.

Mr. Parmer:

That is allright; we agree to that.

Mr. Mershon:

And that said record was made and kept in conformity with a statute requiring such a record to be kept.

Mr. Parmer:

That is allright, but by that we do not mean to imply or say that it was intended to be kept in conformity with any statutory requirement.

Mr. Mershon:

That is allright. And that all writing purporting to be signed by Dr. Spencer Howell or R. Spencer Howell, bearing his initials, is in the handwriting of the said Dr. R. Spencer Howell.

Mr. Parmer:

I will also state that Spencer Howell used "S. H." to identify some of his notes instead of his full name.

Mr. Mershon:

It is further stipulated that the initials "R. H." refer to Dr. R. M. Harris.

Mr. Parmer:

We will stipulate that. I suppose it is right.

130        DON RODERICK was called as a witness in behalf of claimants and, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Mershon:

Q. Your name is Don Roderick?

A. Yes, sir.

Q. Where do you live, Mr. Roderick?

A. 57 Melrose Drive, Miami Springs.

Q. How long have you lived in Dade County?

A. Dade County?

Q. Yes.

A. At least six years.

Q. What is your business?

A. At present I am a Diesel Engineer aboard a yacht.

Q. What experience have you had with yachts and their motors and equipment?

A. My boating experience started in 1923 or 1924.

Q. Are you a mechanic?

A. Yes, sir, and a licensed Diesel Engineer.

Q. Are you familiar with the houseboat Friendship II?

A. To the extent that I did some work on it; I never made any trips or anything like that on it, and never ran it.

Q. Do you know Captain Frederick Roberts who was the Captain of that yacht?

A. Very well.

Q. Do you know Engineer Carl Blount?

131        A. Yes, very well—since 1925.

Q. Were you called to examine the engines and exhaust pipes of the Friendship II sometime in March, 1936?

A. Mr. Mershon, that is not exactly right.

Q. You state it.

A. I was called to make an estimate on installing new pipes in that boat.

Q. What date was it that you first went aboard to examine and figure on installing some pipes?

A. Judging from the records probably the 2nd of March.

Q. What did you do there on the second of March?

A. Well, Mr. Roberts and I went over the boat with a rule and tried to estimate in some manner how the exhaust could be run out of the stack of the boat without too much carpenter work and tearing up of the upper deck-house, and without making too many bends and elbows and too much complication, and we found that it would be a very difficult job without disturbing the entire deck-house and the arrangements there.

Q. How were the exhaust pipes arranged at that time?

A. They went under the floor; they went under the floor—

Q. How many exhaust pipes were there?

A. Two.

Q. One running each side of the center of the boat?

A. Yes.

Q. From the engine?

A. To the stern back.

Q. Did the exhaust pipe run under the bilges  
132 of the staterooms and the dining rooms?

A. Yes.

Q. That is what is known as the bilge of the boat?

A. Yes.

Q. All right. Did you have occasion to examine the exhaust pipes?

A. At Mr. Roberts' suggestion; why he suggested that Carl (Blount) and I look over the present exhaust pipe system and see if we could discover anything wrong with it outside of the patch that the engineer had put on the pipe.

Q. When you say "Carl" you mean Mr. Blunt, the Chief Engineer on the Friendship II?

A. Yes, sir.

Q. Did you make that examination with him?

A. We went in the after-stateroom and took up the carpet on the floor and the hatches; the floor was loosely laid and they had these hatches there for the purpose of examining and cleaning and so forth, and we looked in as far as we could see; in fact, the under structure of this boat is not divided at all by any bulkheads or partitions; from the front of the boat to the aft and clear through to the engine room there is no bulkheads or partitions of any sort, and with a flashlight we could stick our heads down through the floor there and we could see clear up to the light that was in the engine room. There was no noticeable leak or apparent place where it had been leaking, and so Mr. Blount started the starboard engine first, I believe, and with a flashlight I looked forward and could  
133 see clear to the engine in the engine-room, could see clear the whole length of the exhaust pipe, and there was no sign of any leak whatsoever. Then he came back while it was running and I told him that it was Okay, and then he went up and started the port engine, and of course the moment he started the port engine why this hole in the exhaust pipe showed up. We could see the water and gas and stuff coming out of this hole; was up towards the front somewhere. Then we started in the dining-salon and worked back, taking up the carpets and floors, and as we went along we found where the hole was.

Q. How many holes did you find?

A. Just the one.

Q. Where was that hole in the exhaust pipe from which the water and gas was spouting when the port engine was running?

A. If I recall right, it was under the port stateroom in the forward corner; I don't remember the exact arrangement of the boat, but I think it was in the forward corner of the port stateroom.

Q. Do you recognize this picture, exhibit 7, as being the double stateroom on the lower deck of the Friendship II?

A. Yes, that is the after-stateroom.

Q. That is a double stateroom, is it not?

A. Yes, I can see where that might be.

Q. Now where with reference to this port side of the stateroom shown on this picture, Exhibit 7, did you find this leak?

A. Well, there is a hallway I believe going down straight forward from this room and down this  
134 hallway on the port side of the boat in another stateroom, and it was under the floor of that stateroom where the leak was found; it wasn't under the after stateroom at all.

Q. Was the leak near the wall which divides this double stateroom from the port stateroom which you are talking about?

A. My recollection does not cover the exact plan of the boat. If you have a plan of the boat I could be sure.

Q. I am sorry I do not have it.

A. It was near a wall I am sure; I remember that because I worked under something there close to a wall of some kind.

Q. Do you recall which hatch you went down or lifted in order to get to the leak; was it the main hall hatch in the bathroom—

A. I don't believe it was this (indicating) compartment at all.

Mr. Parmer:

You are referring to this form which is being used?

A. It was in the bedroom forward.

Mr. Parmer:

That is exhibit what?



Mr. Mershon:

Seven.

Q. Now, Mr. Roderick, if you will step over here I will ask you to look at these exhaust pipes. I refer to the copper pipes, Claimants' Exhibits 2 to 6, inclusive, and I will ask you if you recognize those as being the port exhaust pipes taken out of the Friendship II?

A. Yes, it is easy to see they are, yes.

Q. I refer particularly to that section of the pipe which is identified as Claimants' Exhibit No. 6, and I call your attention to a composition rubber patch fastened around the pipe about two and a half feet from one end of it, and I will ask you if you placed that patch on that pipe?

A. If this pipe came out of the Friendship II I undoubtedly put that patch on there.

Q. Does that look like that patch?

A. Yes.

Q. You did place a patch on the port exhaust pipe in that position on the yacht Friendship II?

A. Yes, sir.

Q. When did you actually put the patch on?

A. March 2nd.

Q. That would be March 2, 1936?

A. Yes, sir.

Q. I call your attention to another rubber composition patch around the pipe, Claimants' Exhibit 6, and will ask you if you also put that patch on there?

A. Undoubtedly there were two.

Q. There were two holes in that exhaust pipe?

A. If there is any mark on that pipe to tell exactly how it was arranged on the boat—

Q. For your information assume that this point, this first section, Exhibit 5, attached to the manifold exhaust that came from the engine, and the remaining section of pipe numbered 5 which is marked Exhibit 2, and at

tached to that is this other pipe, Exhibit 4, and beyond that is Exhibit 6, and beyond that the connected to that and coming out to the stern was this pipe, Exhibit 3,—

136 A. The hole which I noticed when Mr. Blount was running the engine was the after one of the two patches.

Q. That would be about four feet from one end of the pipe, Exhibit 6?

A. Yes, sir. Now I explained how we found that hole. We started in the dining-room—from the after end; and the point we were looking at was at a point about where this patch is here, and as we were looking back of this pipe and along this pipe we saw this water and stuff coming out.

Q. You were looking at a point about eight feet from where the pipe came out of the stern?

A. Yes.

Q. And you followed the pipe along forward up to the engine?

A. Yes, sir. We came to a place where we saw this water and stuff coming out; by that time we had the carpets and all the hatches were up the whole range of the boat, and of course we made a more minute examination then and from out of that hole there was flowing a considerable stream of water and gas.

Q. You are now referring to the hole about four feet from one end of the pipe, Exhibit 6?

A. Yes, sir.

Q. All right, now outside of that hole?

A. We found another place where there was a plug evidently.

Q. Was water and gas coming out of that?

A. It was leaking a drip like a faucet or something, maybe enough to fill a bucket in 24 hours.

Q. Was it enough for exhaust gas to escape?

137 A. No. In fact, I patched it because that is one way of foreseeing trouble. If we had not patched it then it would have undoubtedly caused trouble.

Q. Did you take off any of the asbestos to look for leaks other than that leak that spouted out when you first saw it?

A. No.

Q. This Friendship II had two engines in the motor room?

A. Yes.

Q. Port motor and starboard motor?

A. Yes.

Q. Each motor had its own separate exhaust pipe?

A. Yes.

Q. Could that boat operate under either or both of those motors?

A. Yes.

Q. I will ask you, with the Court's permission, in the presence of opposing counsel, to remove this patch from the hole which you say you discovered on March 2nd leaking water and gass.

A. (Witness complies).

Q. I call your attention to the hole in that exhaust pipe, Exhibit 6, immediately under the patch you have just removed, and I will ask you if that is about as it appeared that morning when you found it?

A. The hole you see is on the bottom of the pipe and I can't swear that I got my head far enough to look under it.

Q. Was there a stream of water about that size coming out of it?

A. Yes, more or less.

138 Q. Were you asked to put on a temporary patch?

A. Well, after discovering this hole of course we took it up with the Captain, as was the custom, and the Captain told us that he had no authority from the estate for buying

a new exhaust pipe, and that if I could make a patch and put on it why that would be the thing to do.

Q. Captain Roberts told you that he could not make any repairs without getting authority from the owners, is that right?

A. That is right.

Q. Did Captain Roberts make the observation that all of the pipes ought to be replaced at one time?

A. Well, yes, they were going to replace them in some way, and that was the reason why I came down there originally in the first place, to make an estimate on putting these new pipes out through the stack.

Q. Now I believe you said that underneath these staterooms and surrounding these exhaust pipes there were no partitions or anything in the bilge of the boat?

A. No, sir.

Q. Then when that gas came out of that exhaust pipe it was entirely open under the bilge there so that the gas could circulate under the staterooms, both forward and back from the leak?

A. Yes.

Q. Are you familiar enough with the construction of that boat to say whether it was open from the bilge up the sides of the boat between the outside walls of the staterooms and the inside walls of the staterooms?

139 A. I cannot say that I am with that particular boat.

Q. Are you familiar with house boats of that design?

A. Well, I am engineer on one now.

Q. How are those boats constructed with reference to ventilation from the bilge up between the inside and outside walls of the stateroom?

A. Well, along in the top, crosswise, there are slots to allow for ventilation over the bilge through the top.

Q. I call your attention to photographs, Exhibits 7 and 8, which show the aft or double stateroom in the Friendship II, and I call your attention particularly to some little



horizontal openings or vents in the side walls of the stateroom and ask, from your knowledge of these house boats, whether those are the vents you are talking about?

A. Yes.

Q. Based on your knowledge can air and gas or anything else of that nature which may be in the bilge of the boat come up through the sides and into the stateroom?

A. They are installed there for that purpose.

Q. I believe you say you are an engineer on a boat now?

A. Yes.

Q. When the motors are operating and the boat of this type is in motion, what effect, if any, does the moving of the boat against the wind cause in the circulation of current in the bilge? Does it create any circulation in the bilge of air?

A. That would be very difficult to say. I don't believe I have any experience along that line.

140 Q. You never had occasion to observe?

A. No, sir.

Q. Mr. Roderick, assuming that the Friendship II had the ventilators or openings from the bilge directly into the various staterooms through the vents as shown on these pictures, Exhibits 7 and 8, could the exhaust or gas which was escaping from the leak as you observed it have gotten through these vents into this after stateroom?

A. There is no reason why the gas in the bilge would not be able to go into the stateroom.

Mr. Mershon:

If your Honor please, I would like to have this witness take the patch off of this other hole in this exhaust pipe and explain to the Court what he did in connection with that, in order that we may at least dispose of it and know just what happened to it.

A. (Witness complies.)



Q. Mr. Roderick, you have removed the composition rubber patch over the hole in the exhaust pipe about 2-1/2 feet from the end of the pipe, Exhibit 6. I will ask you if where that hole is represents the place where you found a leaking plug on March 2, 1936?

A. Yes.

Q. Please explain why this hole is as large as it is and no plug is found there?

A. Well, the ordinary practice, ordinary good boating practice, in putting a plug into a pipe as thin as that is to build up with brass or copper a little lower, and  
141 I remember knocking something off of here. The plug or this piece, or whatever it was, blow out here, and it was simply leaking around there, and I knocked on it to get a smooth place to put the patch on.

Q. That was originally a drain plug?

A. Yes, sir.

Q. Now I call your attention to some tape about 6 inches from the end of the pipe, Exhibit 5, and ask you if you placed that tape on there or had anything to do with it?

A. No, sir.

Q. Did you observe that tape and this copper moveable sleeve on that piece of pipe at the time you were making your inspection?

A. No, sir. To the best of my knowledge I didn't patch any part of that pipe at all; I just put these two patches on. Mr. Mershon, this represents the thing I have been talking about.

Q. The witness refers to a small cock on the pipe, Exhibit 2?

A. You see how this metal is solid here on the copper exhaust pipe (indicating). In the case of brazing or burning composition on this pipe here (indicating) it would in turn be like an electrolysis operating on that other metal and would eat this thing off, and in that case this whole thing would drop off, leaving a hole probably about

maybe 1 1/4", about the size of that small hole. You can just about see it, and that is what I suspect happened to both of these two holes.

Q. For the purpose of the record, could you  
142 estimate to the best of your recollection about the size of the hole that was around the plug that you knocked out?

Mr. Parmer:

You mean the one that he knocked out on exhibit 6?

Mr. Mershon:

Yes.

A. The one that was already leaking or the one knocked out?

Q. The one you knocked out.

A. That would be about 1 1/4 inches, maybe a little more.

Mr. Mershon:

If your Honor please, I have not had an opportunity, nor have counsel for Petitioners, to see what is under this tape on Exhibit 5, and with the Court's permission we would like to unwrap that in the presence of the Court and see what it presents as bearing upon the condition of the pipe.

Mr. Parmer:

I have no objection, and I have not seen it myself, but so far as bearing on the case I do not see what it has to do with it.

The Court:

If it is on that theory, it will not be considered, but with this explanation it is all right.

Mr. Mershon:

Counsel for complainants proceeds to unwrap some tape from the pipe, and we ask that this tape which was gotten from the pipe be filed in evidence separately as Claimants' Ex. 5-A.

Mr. Parmer:

All right.

Q. Now, Mr. Roderick, I call your attention to a small hole in the exhaust pipe, Exhibit 5, which was found under that tape when it was removed. Please examine the tape and the pipe and state whether in your opinion as that tape was applied over that hole, it was possible for exhaust gas to leak through that hole?

Mr. Parmer:

You have in mind the condition of the tape as it is today?

Mr. Mershon:

Yes, just as it was taken off the pipe, the fact that it was not binding against the pipe where it went over the hole.

Mr. Parmer:

I object to that. There is no foundation laid here for that.

Mr. Mershon:

He is an expert.

Mr. Mershon:

We will withdraw the question.

Q. You say that at the time you made this examination you didn't notice this tape on this pipe (indicating)?

A. No, sir. This tape on this pipe here would be practically in the engine room. The position of that pipe would be about like this (indicating). You will probably find another hole here where the exhaust pipe hits that elbow and comes out at the stern.

Mr. Mershon:

Now, with the Court's permission, we would like to have the wrapping of tape removed from this piece of pipe, Exhibit I.

The Court:

That comes from the starboard side?

Mr. Mershon:

Yes.

Mr. Parmer:

All right.

Mr. Mershon:

I call the Court's attention and counsel's attention to the fact that this tape, as to its condition here, is broken and worn through and has a hole completely  
144 through it directly over or adjacent to the holes  
which are found on that piece of pipe, Exhibit I.

At this time, if your Honor please, these exhaust pipes having been identified, we offer them in evidence, and ask that they be marked Complainants' Exhibits 1 to 6, respectively.

Mr. Parmer:

So far as these pipes may be offered to show some condition obtaining a long time after the so-called accident

happened, I must object to their admission. I do recognize that some of the evidence covers the condition of the pipes as they were at the time, particularly, if your Honor please, Mr. Roderick's evidence with regard to Exhibit 6, and the holes with which he dealt; as far as that is concerned I have no objection.

The Court:

I think there is sufficient identification of the pipes. The objection is overruled and they will be admitted in evidence.

Thereupon the six pieces of pipe above referred to were marked Claimants' Exhibits 1 to 6, inclusive.

Mr. Mershon:

For the purposes of the record, we call the attention of the Court to this piece of pipe, Exhibit I, and to the fact that there appears in the pipe itself, on the outside of the bend, a hole approximately  $7/8$  inches long and varying in width from  $1/4$  inch to  $3/8$  inch. I call attention to Exhibit No. 5 in which there are other small holes, circular in shape and ranging from  $1/16$  to  $1/8$  inch in diameter.

145 (By Mr. Mershon):

Q. I call your attention to the tape attached on the piece of pipe, Exhibit I, and ask you whether in your opinion as an expert that is a sufficient and safe repair to the holes in that pipe.

Mr. Farmer:

I object to that.

Mr. Mershon:

It has been shown that the pipes have not been changed, that the pipes are in the same condition as they came off the boat.



Mr. Parmer:

They came off the boat a long time after the accident.

Mr. Mershon:

We will connect it up later; if not, you can move to strike.

The Court:

All right; the objection is overruled.

Q. Taking into consideration the holes as they appear now and the tape as it now appears—

Mr. Parmer:

You disturbed that when you ran a screw driver through it, didn't you? You are taking liberty with it. The first time I noticed the hole was when you put the screw driver through.

Mr. Mershon:

Does that look like a new hole to you?

Mr. Parmer:

I don't know.

Mr. Mershon:

Just say whether it looks like a new hole or whether it has just been punched there with a screw driver.

Mr. Parmer:

It does not look exactly new.

146 A. From an engineering standpoint, Mr. Mershon, I would say no, but when an engineer on a boat of any sort is forced by necessity to make repairs he uses anything at hand to get by with temporarily.

Q. And that patch is purely a temporary patch?

A. Yes.

Q. What would you call a temporary patch?

A. Until such time as the owners of the boat—and owners are usually peculiar people—some times they will spend a lot of money on something and they won't spend anything on something else, and an engineer might have extreme difficulty in getting an owner to consider necessary repairs, whereas something unnecessary he might get easily. In other words, it is temporary until such time as the owner of whoever is in charge thinks the repairs are absolutely necessary, to make a permanent repair or put in new pipe.

Q. You regard the condition of that pipe as so defective that it could not be used except by continuous temporary repair?

A. Yes.

Mr. Mershon:

You may examine.

#### Cross Examination.

By Mr. Parmer:

Q. When you say "continuous temporary repairs" would be necessary to keep this particular thing from leaking, that is, the holes which you say was in Exhibit I, have you any idea how long such a tape patch will last before it becomes necessary to put on another?

A. Well, not exactly. This stuff is out in salt  
147 water and—The tape on there might stop leaking to-day and to-morrow you would have to put more on that; you can see that this is rotten, that this tape is now; of course you will notice this up here; hot and salt water coming out of this copper pipe—it would not take very long to rot it. It would be perfectly all right except when it is exposed to the same heat and pressure here (indicating); it is bound to be ruined.

Q. We will say in actual service on board a boat, how long can a thing like this continue to serve efficiently in keeping the pipe from leaking?

A. By putting on tape all the time you could keep it going indefinitely; by putting on new tape on top.

Q. Does this show evidence of having had successive layers of tape on it?

A. That is hard to say. There are about eight or ten layers of tape across the center part of that patch.

Q. This particular patch is right in the engine room?

A. Yes.

Q. That is where the engineer stays when he works?

A. Yes.

Q. And that is right in front of his eyes?

A. Yes.

Q. When he looks in that direction?

A. Yes.

Q. You are talking about Exhibit I?

A. Yes.

Q. If he looks along the pipe he can see it?

148 A. Yes.

Q. And that is the way he can tell whether it is leaking?

A. The salt on the outside of the pipe, the salt water sea will show a wet place.

Q. What did you say about salt water?

A. Well, this wet deposit on this pipe would show signs of salt water coming into it from some direction. It might not be on the pipe from the sea; it might be from the pump.

Q. Didn't you say just the opposite, that you didn't know that it leaked there, or it may have been salt on the pipe?

A. It would not show wet on the inside.

Q. Would it show on the next layer below?

A. It might. It might come through this hole.

Q. On the inside layer you didn't see any evidence of leaks there?

A. No, not at this point.

Q. And none at the point where you saw the water which you thought might be salt water which came all the way through? Would you withdraw the suggestion that this white on the outside came from a leak of salt water?

A. Well, yes.

Q. Do you wish to make an observation after I have opened it up?

A. No, sir.

Q. If there had been a hole in the tape you would expect to find some evidence on it of the nature of salt water leaking in some of the inside layers?

A. I should think so.

Q. You didn't find any at all; is that right?

149 A. Yes. The salt might have come through the hole that is in the tape.

Q. All right. We will go over that again. Do I understand you correctly that if the salt water came from the holes in the pipe and such salt water was responsible for this white deposit which you see on the outside, would you expect to find some evidence of that in some of the in between layers of this tape, and especially around the hole?

A. Yes.

Q. You didn't find any such evidence in the inside layers of that tape?

A. No.

Q. In view of that are you prepared to withdraw your suggestion that the white deposit on the outside of the tape came from any salt water oozing from this pipe?

A. There is no evidence there to support it.

Q. Therefore you would be prepared to withdraw the suggestion which you originally made that such was the case?

A. Correct.

Q. Now this pipe was in the engine room where the engineer could see it?

A. Yes.

Q. If there was any gas coming out of this particular pipe, exhibit I, he is going to be the first one who is going to get hit with it, is that right, and in fact he is the only one going to get hit by it right there?

150 A. Yes, sir.

A. Yes, sir.

Q. And if there is any leaking of water from this pipe, he can see it?

A. Yes, sir.

Q. Assuming that he looks at it, of course?

A. Yes, sir.

Q. Mr. Roderick, I call your attention to this hole which is in Exhibit 6; it is the one just about two feet from one end of Exhibit 6 and was, I believe, the one from which you claim you knocked the plug?

A. Yes.

Q. Now that day when you were making your inspection you were looking for leaks, were you not?

A. Yes, sir.

Q. And what was this pipe used for in addition to carrying the exhaust gases?

A. Nothing in the world that I know of.

Q. Was not this what was called a water exhaust?

A. Yes, sir.

Q. All right, what water did these pipes carry?

A. Probably the entire circulation of the engine, in fact I am sure.

Q. It was the cooling system of the engine, the same as you have in an automobile; is that right?

A. Yes.

Q. And the way you discovered the leaking, that is the only thing you considered a leak, was by water coming out; is that right?

151

A. Yes.



Q. And the only place that you saw water coming out of the pipe was at this place on Exhibit 6, which is about five feet from the end?

A. Yes, sir.

Q. Now at this point in Exhibit 6 where you knocked the plug out—

The Court:

Why don't you refer to this one as forward end and the other as the lower end of exhibit 6?

Mr. Parmer:

That is a good suggestion. We will call this the place at the forward end of exhibit 6.

A. All right.

Q. In what way did you determine that there was a leak there; in other words, I want to know what was the condition of the plug with reference to witness.

A. The condition of this plug here?

Q. Yes.

A. May I show you exactly the condition that I found? Here is some asbestos covered by means of crystallization of salt, salt crystallization, and it is on this space here, down here under the pipe, that by reason of the salt crystallization; and then under this (indicating) I knocked that small piece off, and salt seepage was around this end (indicating), or whatever you call it. I knocked a hole in it.

Q. When you say there was a seepage, do you mean that it was wet or that it was flowing?

A. No, just dripping. It was wet and it would drip, drip, drip, drip.

152 Q. Did you see that the water was flowing? I want to know whether you saw it flowing.

A. It was dripping.

Q. Can you give us the rate at which you saw it dripping?

A. I think I would estimate about a bucketful every twentyfour hours. Something like that.

Q. Are you good enough at that subject to make such an estimate?

A. Well, it was a very small drip.

Q. I note before that when Mr. Mershon asked you a direct question as to whether there was any leakage of gas at this place, you said "no". Do you still say that?

A. Yes, no visible leak.

Q. Tell me with regard to the other hole; you said there was gas there?

A. Yes.

Q. Could you see it?

A. In the form of steam, yes.

Q. When you say steam, do you mean steam or hot water?

A. Yes.

Q. What you saw in this other hole was some vapor from hot water?

A. Vapor and water.

Q. This part of the pipe is considerably lower than the engine; when the engine was running, it poured water in there all the time, but there was not enough pressure to push it out the stern.

Q. Now at this forward end of #6 there was no such condition of vapor?

153 A. No.

Q. You saw this wet plug with slowly moving flow?

A. Yes.

Q. You were looking all around?

A. Yes, sir.

Q. For leaks in this pipe?

A. Yes.

Q. From forward to aft?

A. Yes, sir, wanted to get them all.

Q. Did you continue forward from the point which I now point to at the forward end of Exhibit 6?

A. Yes.

Q. Did you continue forward to this exhaust, Exhibit 5, and also to the manifold on the port side?

A. Yes. The hole that was taped would be in the engine room. I mean this one here (indicating).

Q. This one here?

A. Yes, I imagine that was in the engine room.

Q. Maybe so, but what I want to know is did you continue to examine the exhaust pipe to the forward end?

A. Up as far as the bulkhead.

Q. And you didn't go any further?

A. No, sir; I thought it was back.

Q. You thought it was inside of the engine room?

A. I am pretty sure.

Q. And that was behind the bulkhead?

A. You understand the bilge continued into  
154 the engine room and it was open. Where we were standing on the floor of course there was no forward partition. If we had the plans of that boat it would be more helpful in describing locations. We worked the full length of the pipe, feeling and looking as much as possible.

Q. You didn't go into the bilge at any time in order to examine those pipes?

A. No, just working from the floor.

Q. You didn't go into the bilge at any time in order to examine these pipes?

A. No, just worked from the floor.

Q. You didn't go into the engine room?

A. No, sir.

Q. Did you examine the pipes in the starboard side?

A. Yes.

Q. You didn't find any leaks at all?

A. Not at all.

Q. No seepage there?

A. That is correct.

Q. Did you examine the exhaust manifold?

A. No, sir.

Q. In port?

A. No.

Q. Or the starboard?

A. No, sir.

Q. In the engine room?

A. No, sir.

155 Q. Now that you are wrong about the location of this exhibit 5, that is with respect to its position being outside of the engine room in the bilge, and as a matter of fact it was wholly in the bilge outside the engine room, you know that whatever part of it that you did see there was no leak in it?

A. Yes.

Q. You do know that?

A. Yes.

Q. Now you were called upon primarily, as I understand it, to see if some way could be devised for putting these exhaust pipes up in the air and up through the stack?

A. Yes.

Q. Instead of in the bilges under the boat?

A. Yes, sir.

Q. Under the rooms, I mean.

A. Yes, sir.

Q. Was there some purpose to be accomplished in having the pipes go up through the stack rather than under the rooms?

A. Yes, in boats ordinarily they are made to exhaust through the sides, also some exhaust of course through the top. A boat having it out through the top requires it to exhaust and it goes through dry without the water and frequently in sailboats of that sort under certain wind conditions, the exhaust will blow in windows and make someone or all of the party and crew all sick, gives

them headaches or something like that, which is a condition that came to my experience on my first sea trip. It was on the Friendship I in 1926. We went out about sundown and there was a light breeze and the whole crew was sick. That boat exhausted through the side.

Q. The way to avoid that is to get them up in the air?

A. Up in the air.

Q. Now I show you these exhibits 7 and 8 and call your attention to these slots which are just under the ceiling of this double stateroom in the aft part of the boat. Now do those slots appear in all of the staterooms of the boat?

A. Yes, sir.

Q. Now if you have a condition in the bilge where there is an accumulation of motor gas there, including carbon monoxide gas, is there any reason why that won't go up the sides of the vessel and into all of the rooms above?

A. Not at all that I know of.

Q. Now was there in your opinion or experience any reason why such gases, if they existed below, would pick one particular room to the exclusion of all others?

Mr. Mershon:

We object to that question because he is not qualified for the expression of such an opinion. He has not laid a sufficient ground.

The Court:

I think sufficient has been laid for that. Objection is overruled.

A. No, sir.

Q. Now have you had personal experience of the effects of carbon monoxide gas?

A. Yes, sir.



157 Q. Will you tell us what experience you have had yourself?

A. It was in connection with a boat going up Long Island Sound in 1925, with three large engines in the engine room, all of which I was watching. One of these engines blew a what they call gasket, forcing the exhaust gas into the engine room. In making an effort to repair this leak, I apparently became gassed about 11 or 12 o'clock one day and didn't come to until 10 o'clock the next day in the Coast Guard Station. How much detail do you want on this thing?

Q. Well, I have certain points that I want to bring out. Have you any idea about how long you were in the place where you were subject to the fumes?

A. It may have been half an hour or even an hour in that engine room. We had gas masks in the engine room; I reached for one; I remember that the gas was coming in and I reached for it and that was the last thing that I knew. I dropped there on my face on the floor and they pulled me out of there.

Q. You don't know how long you laid on the floor after you passed out?

A. No. I should guess from the various statements that I heard that it was from half an hour to an hour.

Q. How long were you unconscious?

A. From 11 or 12 o'clock one day until 10 o'clock the next day. Almost 24 hours.

Q. You were absolutely out?

158 A. I didn't know anything at all.

Q. Did you have any after effects of that experience?

A. Not for the first thirty days.

Mr. Parmer:

That is all.

## Re-Direct Examination.

By Mr. Mershon:

Q. Mr. Roderick, you are one man who can stand before his fellows and absolutely swear that exhaust gases from a boat can knock you out and if they don't get you soon they can kill you?

A. Yes, sir.

Q. Were you accused of being drunk?

A. No, there was no liquor about.

Q. When they found you that time they thought you were dead?

A. Yes, sir.

Q. Now, I would like to ask in your opinion if there was any reason why gases circulating in the bilge of the boat should not have gotten into that stateroom of the boat?

A. Yes, sir.

Q. If the other occupied staterooms had their windows open and these other staterooms were forward toward the engine, and if they were on the port side, is it not a fact that gases accumulating in the bilge would not stay in the other staterooms with the windows open as it would collect and stay in the master stateroom if the master stateroom windows were down and the door was closed; would not that have a lot to do with the accumulation of gas?

A. It would have a lot to do with it. You  
159. would have difficulty in trying to assume the facts of the various kinds of drafts that you get on a boat, because you get some from the headway of the boat and you get some from the direction of the wind at the time, also certain drafts through the boat or vents, and it would be difficult to assume what the winds or drafts on a boat would do.

Q. But if the travel conditions were right, it would be entirely possible for such a draft to be in the bilge of that boat as to pick up the exhaust gases coming out of the

leak that you found and center them in and around this double aft stateroom, would it?

A. I imagine it could be forced back through there if you have enough pressure.

Q. If the conditions are right and draft came through the bilge—

A. Never saw bilges having that much draft.

Q. I am assuming that it is possible.

A. Yes, it is possible.

Q. Now we are talking about the engine room; is it not customary to have at least one electric fan in the engine room to keep the gases going or keep the gases clear?

A. Usually.

Q. Isn't a fan a part of the standard equipment of the engine room?

A. Yes, I have three in my engine room.

Q. Now let's explain a little more about the function of these exhaust pipes. Do you know the horse power of the motors in Friendship II?

160

A. I believe they are 125 H. P.

Q. Now they had a water cooling system?

A. Yes, sir.

Q. Which means that the motors draw sea water from the outside which circulates around the jacket of the motor and that vapor is carried with the exhaust of the motor back through forty feet of copper tube out through the end of that pipe?

A. Yes.

Q. The moisture comes out of the pipe and the water drains in and circulates and the gas exhausts from the motor?

A. Yes.

Q. Would the end of these exhaust pipes be under water or at the water level?

A. Not one under water.

Q. Now was there pressure on these pipes?

A. Considerable, yet I don't know the exact poundage, but it was quite considerable.

Q. Is that pressure aided by the fact that when the exhaust pipe runs aft from the motor it slants downward and then it comes out the stern of the boat and it rises slightly and goes up at the stern of the boat?

A.

Q. The pressure on these pipes when the motor was running was sufficient to discharge quite a bit of gas and vapor into the bilge of the boat?

A. Yes. He said he pumped the bilges out  
161 once a week or every two weeks.

Q. What would you say would be the average for that?

A. That is about right.

Q. Did you pump the bilges if you have no leaks in your exhaust line?

A. Yes, just to make sure they are dry.

Q. Did he indicate there was considerable water in the bilges when he pumped?

A. No, he didn't; that was a peculiar thing about it.

Q. I was about to forget to ask you. Did you remove the asbestos from the exhaust pipe when you examined it?

A. I don't believe so.

Mr. Mershon:

While Mr. Roderick is here, I should like to strip that asbestos off and see if there are any other holes in there. We might use Mr. Roderick here as an expert in connection with that.

Mr. Parmer:

I have no objection.

Mr. Mershon:

Suppose we take just a moment and look at the pipe. Now the asbestos is being stripped or loosened from the section of pipe, Exhibit 6.

Mr. Parmer:

Mr. Roderick, will you tell us here some place that looks suspicious; I want you to point it out to us.

Witness:

Here is a big one right here.

162 Mr. Parmer:

Now do you suppose we can see that open so we can see how thick it is.

A. Yes.

Mr. Parmer:

May we have that place to which Mr. Roderick pointed on exhibit 6 marked with the letter "T"?

Witness:

Would you like to have me do that this afternoon?

Mr. Parmer:

I will withdraw the request.

Mr. Mershon:

The asbestos was stripped from the pipe, Exhibit 3, and around the section of the pipe from which the asbestos was stripped we found no leaks in said pipe.

The Court:

Now there are a couple of questions I would like to ask Mr. Roderick.

Mr. Roderick, when you put this patch at the forward end of exhibit 6 and there was some substance in that hole which you removed, was that a metal substance or what was the character of the substance that was in there which you removed?



The Witness:

It was a small place similar to this here on this exhibit (indicating).

The Court:

It was not a pet cock, was it?

Witness:

It might have been, or a plug, one or the other. It was some method of drainage.

The Court:

Some instrument for draining the pipe?

Witness:

Yes, similiar to this one here.

The Court:

That was leaking or oozing this dripping which you estimate to be a bucket a day?

Witness:

Yes, sir. It is my opinion, though I have no evidence to support it, that the aft hole was smaller, that it was simply something that sluffed off and made this hole (indicating).

163 The Court:

I am going to ask you about that. The hole at the lower end of exhibit 6, which you patched. Was that under the bottom side of the pipe and your inability to turn it prevented you from seeing it, or was it under water? You said that water was in the bilge at times.

Witness:

The hole was in the bottom of the pipe.

The Court:

And was it because the pipe was stationary and could not be turned over which prevented you seeing it?

Witness:

Yes.

The Court:

Did you take a flashlight to see it?

Witness:

A portable light.

The Court:

Did you actually see it with the aid of the portable light?

Witness:

I could not at all; I could feel it and tell.

The Court:

You felt it with your hand?

Witness:

I know that, but whether I actually saw it I don't know.

The Court:

Was there any water in the bilge at the time?

Witness:

There normally is some, but not an abnormal amount.

The Court:

So whatever water was in the bilge it did not interfere with the inspection of the place of collapse?

Witness:

Not at all.

The Court:

Well, now from a mechanical standpoint, when the exhaust from the engine is mixed with water used  
164 in circulating system, is there any chemical reaction between the water and gas?

Witness:

I believe not; not that I ever heard of.

The Court:

So it is your opinion that when the water goes out through the end of the pipe, out into the sea, and also the exhaust, that they go out in the same condition as they enter the pipe?

Witness:

Yes.

The Court:

When the bilge is damp, is it necessary or customary to open up any of the floor boards and look in the bilge or does an engineer just automatically—

Witness:

99% of the time, no, unless you have some trouble with the pump and want to see what the pipe was doing. In your engine room you have a system of valves and in your bilge you have a system of pipes that run to various parts of the boat. When you start your bilge pump and you turn your valves on you can tell by the action of the pump whether it is pumping water or soaking it dry. Then you cut that section off and pump another section without leaving the engine room at all. You can always tell that way.

The Court:

What is the structural arrangement in the bilge between the exhaust pipe, the circulation system pipe and the

piece of machinery that connects the engine with the screw or propeller?

Witness:

Well, the way it lays there on the floor (indicating) pipes on Courtroom floor; the shaft, if I remember right, would be about here this far away from it and below it.

165 The Court:  
How much below it?

Witness:

Probably 15 to 18 inches.

The Court:

Do you know the occasion for putting that pet cock in exhibit 5?

Witness:

Yes. The exhaust pipe you see is lower and it is there as a means to drain the water.

The Court:

Was that an after-thought after the original construction?

Witness:

No, that was a part of the original construction.

The Court:

That pet cock was probably a part of the original construction?

Witness:

Yes.

The Court:

Now, as I understand it, when you first went there the engine on the starboard side was started?

Witness:

Yes.

The Court:

And you had placed yourself in a position where you could see the entire length of the exhaust pipe up to the engine room where the pipe went into the engine room?

Witness:

Yes.

The Court:

And along that pipe you saw nothing irregular about it at all?

Witness:

No.

The Court:

And if in this exhibit here, Exhibit I, which is a part of the manifold from the starboard side, there was any leakage there this wrapping on it would have  
166 been visible to your eye in the engine room?

Witness:

Yes.

The Court:

So when you made your observation from the starting of the engine, and observed the workings in the starboard side, there was nothing irregular at all?

Witness:

No, sir.



The Court:

From your observation after the engine was started on the port side you saw this leaking through this hole which you described at the upper or forward part of Exhibit 6 and you also saw the escape of water and gas from the hole at the lower end of the exhibit?

Witness:

With this slight difference, Judge; the slight leak in the forward hole was not discovered until a closer examination of the pipe was made. In other words I was back in the stateroom looking down the whole length of pipe and I could easily see this hole flowing out water; that was open, but I didn't see this smaller leak until a closer examination of the pipe.

The Court:

Then you removed whatever packing there was and put this patch on?

Witness:

Yes, I took a hammer and knocked it off and made a smooth place in the pipe for the patch.

The Court:

That is all.

Mr. Mershon:

Q. Was there any asbestos over this hole where you saw steam and vapor and stuff coming out?

A. Not over the hole; there may have been.  
167 I could not remember but what there was something on the other side.

Q. You cannot say positively then whether there was any covering over that hole or anything?

A. No.

Q. Did it impress you as being active, flowing out, all that steam and vapor?

A. Yes, it was quite a little geyser.

By Mr. Parmer:

Q. When you put this patch on this after hole in exhibit 6, did you sort of clean it up?

A. Yes.

Q. So that you could have a smooth surface?

A. Yes.

Q. In this after hole in Exhibit 6, was the principal thing which was coming out of that hole water?

A. It would be hard to say because there was so much pressure but that is all you could see of it; there was quite a considerable amount of it.

The Court:

How long had the engine been running to develop that pressure?

Witness:

Immediately he started it. I could see it; it did not take a minute or any time at all; immediately he started it I could see it.

By Mr. Parmer:

Q. Was it a continuous stream or did it come out in jerks?

A. Jerks and spurts.

Q. You did make some inquiries in regard to the bilges?

A. Yes, I asked Mr. Blount, I said: "You must have to pump the bilges quite often"; he said, "I don't pump them at all except once a week or every couple of weeks."

Q. In other words he indicated there was no condition of the bilges which would follow from the condition of the pipe?

A. That is what he told me at the time.

Q. At the time you were called aboard the ship your sole idea in going on board was to figure on this problem of putting the exhaust through the stack?

A. Yes.

Q. At that time you didn't know anything about these holes in the pipe?

A. No, sir.

Q. In order to find out about these holes you had to rip up the carpets in the rooms and get down and examine it to find out?

A. Yes.

Q. That was something extra which you had not counted on when you went on board the ship?

A. Yes.

Q. Were these hatches covered by carpets?

A. Yes.

By Mr. Mershon:

Q. It was only in the aft-stateroom that the carpet was over the floor?

A. Not all of them.

Q. But not in the bathroom?

A. No, I guess not.

169 The Court:

All right, gentlemen; we will take a recess until two o'clock. Are you through with this witness?

Mr. Mershon:

Yes.

(Recess.)

170 OTIS COLEE, a witness on behalf of the Claimants, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Mershon:

Q. What is your name, please?

A. Otis Colee.

Q. Where do you live?

A. I live two miles north of Daytona Beach.

Q. That is in Florida?

A. Yes.

Q. Are you at present employed by Mr. C. M. Baker?

A. Yes.

Q. And what firm or business does he operate at Daytona Beach?

A. Daytona Beach Boat Works.

Q. What does he do there?

A. Well, I don't know just how to put it; he builds boats and he stores boats and does general repairs of all kinds.

Q. Does he buy and sell boats?

A. He does.

Q. What is your position with him?

A. I rank as Chief Engineer with him.

Q. Were you his Chief Engineer in October, 1936?

A. Yes.

Q. Did you go aboard the Yacht Friendship II, as Mr. Baker's chief engineer when he acquired that boat from the trustee in bankruptcy?

171 A. Yes.

Q. I mean the trustee of the Federal Court?

A. Yes.

Q. Do you recall about when it was you went aboard?

A. As near as I can recall, I left Daytona Beach on the 5th day of October—I am not sure but I think we went aboard somewhere around the 3th of October.

Q. Was the Friendship II lying at dock over at Ft. Myers?

A. Yes it was lying at a private home, somewhere just south of the main part of town.

Q. She was tied up to the shore?

A. Yes, and also the Dalton was on the other side.

Q. Did you inspect the Friendship II when you went aboard?

A. Just a general overlooking of it.

Q. Did you make any changes or repairs in the exhaust pipes of the boat after you went aboard?

A. No, not until we came from Ft. Myers to Miami and we made a change at the Coconut Grove Boat Works.

Q. Were you aboard as chief engineer when the Friendship II was brought by Mr. Baker over to the Coconut Grove Boat Works at Miami?

A. Yes, I was.

Q. Did you observe anything about the condition of the exhaust pipes of that boat while you were bringing her over from Ft. Myers to Miami?

A. Yes, I noticed these patches put on there were giving through; they were leaking water in the bilges.

Q. What attracted your attention to it?

172. A. I went back to it and put on a new patch; just had it on a short time; I went back and checked the stuffing box and found water in the bilges, and I looked around—I started looking around, raised the floor boards and found that the exhaust pipes were leaking and I also got a headache from the monoxide gas which was under the floor board.

Q. You felt the effects of the gas that was coming out of these leaks?

A. Yes.

Q. How did it affect you?

A. Slight headache.

Q. Besides seeing about the bilge, what if anything, did you do to the patches?



A. Didn't do anything.

Q. What precaution, if any, did you take against the effect of the gas that was coming from those leaks?

A. Raised all of the windows to get circulation of air.

Q. Did you issue any instructions to your crew?

A. Yes, I told the boys that I would go in and take care of them myself. I told the sailors and the Captain and the cook that I was going under the deck quarters.

Q. On checking the stuffing box—is that what you call it?

A. Yes.

Q. That is the box that surrounds the hole where the propeller shaft goes out to the water?

173 A. Yes.

Q. Did you find any leaks there?

A. They would have only small leaks of water, small drips of water.

Q. They wouldn't account for the amount of water in the bilge?

A. No.

Q. You do know that sufficient water was coming through these patches on the exhaust pipes to create too much water in the bilge?

A. Yes.

Q. Did you observe the water in the bilge from the engine room?

A. No, sir, you couldn't tell that on account of the separate bulk head.

Q. How did you become aware of the water in the bilge?

A. When I raised the hatches up to look at the stuffing box, I could see water. I went around to see where the water was coming from and I found it under the dining room salon on the port side.

Q. Were you present at the Coconut Grove Boat Works, otherwise known as Donovan's Boat Yard at Coconut Grove, when the exhaust pipes were removed from the Friendship II?

A. Yes.

Q. As they came out of the boat at Donovan's Boat Yard, were they in the same condition as they  
174 were when you first went aboard over at Ft. Myers?

A. Yes.

Q. I will ask you to step over here Mr. Collee and I will state to you that these six pipes, Exhibits 1 to 6, have been identified as the exhaust pipes which came out of the Friendship II, at Donovan's Boat Yard, saying that these sections 4 and 3 represent the last section of the port exhaust pipe toward the stern and this exhaust pipe (referring to Exhibit 6) had two patches on it. Do you recognize these exhaust pipes?

A. Yes.

Q. Which of the patches on the pipe, Exhibit 6, was the one that you say was leaking and causing the water in the bilge when you brought it over?

A. This one here.

Q. That is the forward patch?

A. Yes.

Mr. Mershon:

The witness refers to the patch about two and one-half feet from the end of the pipe.

Q. Now referring to the construction and design of the Yacht Friendship II, I will ask you if you had occasion to look in the bilge through which these exhaust pipes ran?

A. Nothing other than the checking of the stuffing box at the present time.

Q. And later when the exhaust pipes were taken out, you were present?

175 A. I was.

Q. You had a full chance to observe the construction of the boat?

A. Yes.

Q. Were there any partitions or anything in the bilge? aft of the bulk head that separated the engine room from the dining room?

A. No, there were no bulk heads aft.

Q. It was wide open?

A. Yes, on account of the water tanks; of course there was circulation of air going around the water tanks.

Q. There was a circulation of air which would go around the water tanks?

A. Yes.

Q. The water tanks took up some space in the bilge?

A. Yes.

Q. Did the bilge open into the state rooms through vents which connect with the inside of the state rooms to an opening between the walls of the state rooms and the outside walls of the cabin?

A. Yes.

Q. So there was a direct communication for air or gasses from the bilge directly into the state rooms through these vents?

A. Through the vents, yes.

Q. Were there other means of direct communication from the bilge into the state rooms through main  
176 holes or various kinds of hatches?

A. Well I don't know, on account of at certain times there would be hatches and at other times there would be carpets on the floor.

Q. But all of these hatches in the bathrooms and state rooms have a hole in them that you reach into to lift them up?

A. I don't know whether all of them but some of them did.

Q. Were there any carpets in the bathrooms?

A. There was linoleum, in the bathroom on the port side.

Q. In the bathroom on the port side? And that linoleum also covered a hatch?

A. Yes.

Q. And the hatch was removed with the linoleum fastened to it?

A. That I don't remember.

Q. I show you two photographs which have been marked Claimant's Exhibits 7 and 8 and I ask you if you recognize those as being true representations of the double state room on the lower deck at the end of the hall which ran from the dining room on the Friendship II?

A. Yes, looks like the starboard master state room.

Q. Referring to Exhibit 8. Now what does Exhibit 7 look like to you?

A. I don't quite remember on account of not being on the boat long enough to be acquainted with it. The first one I understand but the second one, I don't.

177 Q. To refresh your memory, I will ask you if Exhibit 7 resembles the port bunk in the master state room or double state room on the Friendship II?

A. This is the starboard state room here (indicating). Here is the bathroom; I wasn't there long enough to get it acquainted in my mind.

Q. You were mainly interested in the engines and the pipes?

A. Yes.

Q. What equipment, if any, was there in the engine room for ventilating it?

A. Two windows on the port side and an exhaust fan.

Q. What side was the exhaust fan on?

A. The exhaust fan was on the forward bulk head.

X Q. Would that fan have a tendency to draw air across the engine room toward the rear of the boat?

A. Yes it would.

Q. Was there any opening in the rear bulkhead of the engine room through which air and gasses might pass from the engine room into the bilge?

A. There was a small opening around the shaft.

Q. The propeller shaft?

A. Yes, a small opening, I don't know the dimensions of that but there may have been some circulation around it, maybe a half inch, something like that.

Q. Now the floor of the engine room was on the bottom of the boat?

A. No, it was built up higher; I guess it was  
178. maybe two feet from the engine room floor to—

Q. I see, but the floor of the dining room was built up higher than the engine room?

A. On the same level.

Q. Did you make any report to Mr. Baker, your owner of the condition you found the exhaust pipes in?

A. Yes, I told him that I found them in an unsatisfactory condition and he wanted a new exhaust line put in.

Q. From what you saw there, did you or did you not regard the condition of those exhaust pipes as dangerous to the crew and the guests aboard?

A. Yes, I did.

Mr. Mershon:

That is all.

### Cross Examination.

By Mr. Parmer:

Q. Your primary interest in looking below the floor was to look at the stuffing box?

A. Yes.

Q. Then you saw some water in the bilge?

A. Yes.

Q. How much water?

A. Well, I don't know exactly. I don't know how many gallons there was in it.

Q. You had no idea that more than the ordinary amount of water was in the bilge at that time?



179 A. A little more than a boat of that type should have—a lot more than a boat of that type should have.

Q. Unless it was pumped out?

A. Unless it was pumped out recently.

Q. Then in a boat in current use, you would not expect to find so much water in it?

A. No, sir.

Q. Were you aware at the time you looked at the boat that the boat had been in the custody of the Court for a considerable period of time before Mr. Baker got it and that it was not in use at that time?

A. Yes.

Q. And it is true that a boat lying in water without pumping the bilges, it will accumulate more water in the bilges than ordinarily?

A. Yes, it will. When I found the water was when I had my motors running.

Q. I understand, but just allowing a boat to remain in the water and failing to use the bilge pump and pump the bilges, will increase the amount of water in the bilges?

A. In some cases it will and in some not.

Q. That is where the water comes in, leaking in from the sides?

A. Comes through the stuffing box.

Q. Also in from the sides?

A. Yes.

180 Q. And the bilges are supposed to take care of that?

A. Yes.

Q. Of such water?

A. Yes.

Q. It was at that time while you were looking at this bilge that you happened to see the leak from one of these patches?

A. Yes.

Q. And your motor was running then?

A. Yes.

Q. Where was the boat?

A. The boat was leaving Ft. Myers coming to Miami.

Q. It was on a trip?

A. Yes.

Q. Was it king at both ends of the rubber patch or only one end?

A. Only one end.

Q. Did you notice at that time that the rubber patch had around it a metal strip?

A. Yes.

Q. Did you endeavor to tighten it?

A. No, sir.

Q. You perceived at the time that the metal strip was held together and could be tightened by means of a bolt and a nut which were there, did you not? Just answer the question. You saw the bolt and the nut there, did you?

A. Yes.

Q. Did you feel that you wouldn't patch it because it was galvanized iron?

181

A. Yes.

Q. Did you think it might break?

A. I don't know.

Q. Any way you didn't want to fool with it and tighten it up?

A. Yes.

Q. For all you knew, you could have tightened it?

A. I don't know whether I could or not.

Q. You made no effort?

A. I made no effort at all.

Q. But as an engineer, you are familiar, are you not, where bolts and nuts are used to tighten up things when they become loose?

A. Yes.

Q. And for a minor repair you could twist the bolt in the nut and tighten it up, is that true?

A. That is correct.

Q. Now you say the particular place where you discovered this particular leak of which you are talking was in the dining room?

A. Yes.

Q. That is just underneath the floor of the dining room?

A. The floor of the dining room.

Q. And you found that by a hatch that was  
182 in the dining room?

A. Yes.

Q. Just underneath the hatch?

A. Yes.

Q. Now in the engine room of that boat, the engine is entirely enclosed by means of bulk heads on four sides?

A. Yes.

Q. Entirely cut off from the bilges except for this place where the shaft goes through one of the bulk-heads?

A. Yes.

Q. And there was a space around the shaft you say, having a dimension of half an inch?

A. Something like that.

Q. You are not perfectly sure what it was?

A. No I am not.

Q. Did the engine room have a skylight?

A. No, sir.

Q. But it had a window on each side?

A. No, it had two windows on the left side and no windows at all that you could open on the starboard side.

Q. Were there windows on the starboard side?

A. Glass but not windows.

Q. Just glass?

A. Yes.

Q. What kind of a fan was this?

A. 14 or 16 inch.

Q. Was it so arranged that it could be pointed  
183 in the direction that you wanted ventilation?

A. Yes.

Q. Well, then, if it could be pointed where you wanted it, it would follow that necessarily when that fan was going it would blow the atmosphere of the engine room toward the bilges, would it not?

A. The bulkhead was just about here (indicating) and you could turn the fan and blow the air forward or whichever way you wanted to.

Q. Dependent on the way it was pointed?

A. Yes, sir.

Q. I think you expressed your opinion with regard to the danger in allowing this patch to remain in the condition in which you found it?

A. Yes.

Q. If it remained in that condition it might grow worse?

A. Yes.

Q. During the time that you were going around from Fort Meyers to Miami, you didn't attempt to make any repair of it then?

A. No, sir.

Q. You slept in the deck room yourself?

A. No, I slept in the forward quarters.

Q. Nobody slept in the passenger accommodations at all?

A. No, they are guest quarters.

Q. There were no guests on the boat at that time?

A. No.

Q. When you got around to Mr. Baker's place, you decided to get new exhaust pipes entirely?

A. Yes.

Q. Did you put them up in the stack?

A. No, in the same place that the old ones came out.

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## Re-Direct Examination.

By Mr. Mershon:

Q. Are you familiar with the record of the Friendship II as to when she was built?

A. As near as I recall, it was in 1922.

Q. Can you say whether these pipes that you found in her and which were taken out were the original equipment with which she came out of the factory?

A. No, I could not say.

Q. You could not tell that?

A. No, sir, I could not tell that.

Q. What size exhaust pipes are those that were taken out? And which are here in evidence?

A. I think these measure 3 inches outside diameter.

Q. What size pipes did you replace them with?

A. 3½ inches.

Q. Copper tubing?

A. Yes.

## Re-Cross Examination.

By Mr. Farmer:

Q. Tell me, Mr. Colee, when you looked at this patch that was leaking at one end you say you smelled some of the motor gas?

A. Yes.

185 Q. Was the smell that you smelled at the time the same as anyone would smell from the exhaust of an automobile?

A. About the same thing.

Q. Well, did you stay there very long? Smelling it?

A. No, sir.



Q. How long did you stay smelling it?

A. Just a very few minutes; I would go in and out.

Q. What is that?

A. I would go in and out; I didn't stay in there any length of time, just a few minutes at a time, and then I would go back up for fresh air.

Q. When you uncovered the hatchway and looked down and found the condition, what did you do?

A. I hooked up a small motor we had,  $\frac{1}{4}$  H. P. electric motor, and pumped the bilges out with that on account of the other pump in the engine room was not working. I hooked up that to pump out the bilges until we could get to Miami.

Q. Where did you put the receiving end of that pump?

A. Right down in the dining salon, back of it.

Q. Through the hatch?

A. About the center of the hatchway.

Q. You pumped the bilges with this motor pump?

A. Yes.

Q. You didn't remain in that vicinity any more than it was necessary?

A. No, sir.

Q. And during that time you would go back and forth?

A. Yes.

Q. You were visiting other places while this pump was working?

A. I would go back there maybe every three  
186 hours or something like that, or two hours.

Q. Every 3 hours you would go back and see how the pump was getting along?

A. No, sir. I would start the pump to pumping the water out and I would watch it and as soon as it pumped it out in one place I would shut it off and then go on back to the engine room.

Q. How long did the pump work pumping out the bilges?

A. That I don't remember.

Q. Did it work as long as one hour?

A. No, it was under one hour.

Q. While it was working you would stick your head out of the window?

A. Yes, I would stick my head out of the window to get fresh air.

Q. As a result of the precautions that you took you didn't get any headache, did you?

A. I did.

Q. You got a headache and then you stuck your head out of the window?

A. Yes, sir.

#### Re-Direct Examination.

By Mr. Mershon:

Q. Was the water in the bilge coming through loose planks or leaks in the bottom?

A. No, sir; the water came into the bilges that I found in there through the exhaust line.

#### Re-Cross Examination.

By Mr. Parmer:

Q. You say some water came from the exhaust line into the bilges?

A. Yes.

Q. You don't know where the water that was there before you arrived came from?

A. We were on dry dock back in Fort Meyers and we had taken the plug out and we had 3 inches of water before we left Fort Meyers.

Q. How long had the boat remained in the water after you had gotten out of dry dock?

A. I think it was 3 days.

Q. You can't tell us just how deep the water was in the bilges?

A. No, sir.

Q. Therefore, you can't tell us really whether it was more than ordinarily?

A. No, because I was not acquainted with the boat. I had just been on it a short time.

Re-Direct Examination.

By Mr. Mershon:

Q. But your idea was to keep the bilges dry?

A. Yes.

Q. The water kept constantly coming in through the exhaust?

A. Yes, sir.

188 Mr. Mershon:

If Your Honor please, I now offer in evidence as Claimants' Exhibits 9-A to 9-L the hospital records which have previously been identified, as Claimant's Exhibits under those numbers, the authenticity and making of which have been proven by stipulation and made a part of the record.

Mr. Parmer:

If the offer has been completed, I object to the admission in evidence of these records on the grounds that they are hearsay and not admissible to prove the facts which they purport to state; that the proper way to prove the facts attempted to be proven in this fashion is to call the physicians who are acquainted with the facts which these records purport to state. I am informed that each of the physicians who are represented as having made statements in these records are available. Dr. Spencer Howell is in the Security Building, a block

and a half from the Court House, and Dr. Harris is in the Huntington Bldg., slightly further from the Court. I believe these are the two physicians who have made entries. In addition to that, there are entries here which I do not think would be admissible under any theory. In this connection I might say that ordinarily I would not object to records going into evidence because most often they are true but in this case I expect to prove when Dr. Howell is called that this record is not true and was not meant to be true at the time it was made.

Mr. Mershon:

The offer is made subject to any cross examination of any persons mentioned therein, or persons in charge of the records or making thereof, which the petitioner may wish to make. Have you stated full your objections?

189 Mr. Parmer:

I have stated by objection completely and I have no reply to what you have just stated.

The Court:

Let's have the argument from one side at a time. Are you prepared to argue that, Mr. Mershon?

Mr. Mershon:

Yes.

The Court:

Are you prepared to argue your objections?

Mr. Parmer:

I have only this one thing to say, which is in answer to what I have just heard. A suggestion has been made that these be received subject to any cross examination or anything that I might want to bring out by present-



ing witnesses. I think that is putting the cart before the horse and claimants are still in their direct case.

(Extended legal argument.)

The Court:

In the first place, the documents are hearsay, as to the issue here, their immateriality is with reference to the diagnosis of the patient, Mrs. Just. The real issue as to which these documents are tendered is the cause of this lady being admitted as a patient in the hospital, whether it was CO<sup>2</sup> poisoning, carbon monoxide, or whether it was some other reason. Now these sheets indicate that she was admitted for carbon monoxide poisoning. The witnesses are available and this is hearsay, so fundamentally I think that the tendered documents as proving that fact are hearsay. If the documents were tendered to show the date of admission, how long the patient remained in the hospital and routine matters of that nature, that would be a different proposition.

190 But this is shown evidence involving the diagnosis of the ailment for which Mrs. Just was admitted for treatment in the hospital. (Citing authorities.) I think that we should have the benefit of witnesses present, subject to cross examination, to testify and not depend on these records. I shall admit the documents for the purpose of showing admission into the hospital, how long she remained there and possibly some other matters of that nature, but as to the real issue here, I shall hold this as opinion evidence, which is of the hearsay class, and think it should not be admitted.

Mr. Mershon:

We also offer, if the Court please, the personal history signed by Dr. Spencer Howell, in so far as it reflects the treatment which Dr. Howell, over his signature, recites that he gave to this patient.

(Legal argument.)



191. Thereupon DR. FRANK W. FOXWORTHY was called as a witness in behalf of the Claimants, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Mayne:

Q. Please state your full name, please.

A. Dr. Frank W. Foxworthy.

Q. Where do you live?

A. Miami Beach.

Q. Do you live here all of the time or do you commute?

A. Part of the time here.

Q. At the present time where are you residing?

A. In Illinois.

Q. You are a married man, are you?

A. I am.

Q. Do you have a family?

A. One daughter.

Q. How old are you?

A. 63.

Q. What schools or school are you a graduate of, doctor?

A. I attended the Depauw University at Greencastle, Indiana and the Indiana University of Medicine, School of Medicine, and I had some post-graduate work at the New York Post-Graduate School, in Paris and London and several other different places.

Q. Did you take post-graduate work in Paris and London?

A. Yes, sir.

Q. Was your schooling before or after the Spanish-American war?

A. After. I had three years of the Spanish-American war in Cuba and two years in China.

Q. Were you in the Medical Corps?

A. I was a captain in the 34th U. S. Volunteers; I was acting surgeon at one time in the United States Army, and then I was Chief Surgeon of the National Guard of Indiana and also surgeon of the First Indiana on the Mexican border.

Q. That was in 1917?

A. About 1916 or 1917.

Q. After the Spanish-American war you took a trip around the world, I understand?

A. Yes.

Q. It was during these travels that you took your post-graduate work?

A. Part of it.

Q. When did you actively engaged in the practice of medicine?

A. In the private practice of medicine in 1901.

Q. And where did you engage in that practice?

A. In Indianapolis.

Q. Now in the course of your practice did you specialize in any particular branch of medicine?

A. Internal medicine and insurance medicine.

Q. What do you mean by insurance medicine?

193 A. It seems to be a specialty nowadays, Mr. Mayne, where most of your time is occupied with insurance work—medical work, of course.

Q. Can you state how many companies you have represented in this medical work?

A. Well, at one time I represented over 70 here in Miami when the boom was first here; I was Medical Director of two different companies in Indianapolis, and I was chairman of the Medical Section of the Mutual Life and was on the board three years.

Q. How long did you stay in Indianapolis?

A. Until 1925.

Q. Were you on the staff of any hospital there?

A. Yes.

Q. What hospital?

A. St. Vincent's, Methodist Hospital and the City Hospital.

Q. How long did you practice in Indianapolis?

A. One year as an interne at St. Vincent's Hospital, and then from 1901 to 1925.

Q. Where did you go then, doctor?

A. Miami Beach.

Q. I believe you stated that you had one daughter, is that correct?

The Court:

Q. Did you know Mrs. Charlotte Just before 194 she was married?

A. Yes, sir.

Q. When did you become acquainted with Mrs. Charlotte Just?

A. When she was my daughter's room-mate in college about ten years ago.

Q. And where was this college?

A. At Millbrook, N. Y.

Q. The Bennett School?

A. Yes, sir.

Q. Mrs. Just as I understand was a school room-mate of your daughter?

A. Yes, sir.

Q. During what period of time was that?

A. That was probably the better part of two years, following which Mrs. Just visited us several times of several weeks duration.

Q. During the time that Mrs. Just was with your daughter at the Bennett School did she visit you in Miami?

A. She did.

Q. How many times would you say she visited you?

A. Several different times, maybe four or five or six.

Q. How long would you say she stayed with you?

A. Sometimes as much as two months.

Q. At that time can you describe just in a general way, not too much in detail, Mrs. Just's general appearance so far as you could observe?

A. Mrs. Just's general appearance was that  
195 of an active healthy young girl; she is very lively in her movements; her brain was keen and active and oftentimes she got the point before you reached it in conversation. She was generally what you would type as a mental type of girl and an exceedingly bright mind. She had no defects, physical defects, that I know of.

Q. Did she express personality?

A. A vivid personality; she had "it".

Q. When did your daughter marry?

A. About eight years ago.

Q. Did you see Mrs. Just at that time?

A. She was my daughter's maid of honor at the wedding.

Q. And that was where?

A. In New York City.

Q. Now at that time did you observe anything unusual about Mrs. Just at the time of the wedding?

A. No, sir.

Q. Now when did you see Mrs. Just after that time?

A. I don't know; I can't give the exact dates.

Q. Approximately?

A. I remember distinctly that when Mrs. Just got married she wired us that she was coming down here on her wedding trip to visit us at the Pancoast Hotel.

Q. Did you meet her and Mr. Just at that time?

A. Yes.

Q. How long were you with them on that occasion?

A. Probably several weeks.

196 Q. Then they were both down here?

A. Yes.

Q. Visiting your home?

A. We were living at the hotel—

Q. Now did you see Mrs. Just after that time?

A. Yes, sir.

Q. After they were here on their honeymoon, so to speak?

A. Yes.

Q. When was that?

A. I think the next time was two or three years, when she came down to spend the winter and then in the meantime she got married and had one child.

Q. Let's see if I can refresh your recollection. It was in the spring of 1935, was it not?

A. I think so.

Q. At that time her baby was a mere infant, is that correct?

A. Yes.

Q. Where was she living at the time when you saw her here in 1935?

A. I think she was in a bungalow there at the Nautilus Hotel, on the beach.

Q. Who was with her at that time?

A. My recollection is that it was her mother, grandmother, aunt, nurse and baby.

Q. Will you tell us if Mrs. Just showed any interest or great interest in her child at that time?

A. She always had; she always took extreme  
197 care that the child got proper attention.

Q. Do you know whether at the time you saw her in the spring of 1935 was shortly after her divorce?

A. I don't remember.

Q. Well at that time, did you see her in the spring of 1935?

A. It was probably so.

Q. Well, her husband was not here?

A. No, he was not with her.



Mr. Parmer:

I will concede that it was shortly after the divorce.

Q. Now at that time did you observe anything about her manner, personality, or expression in the spring of 1935 that would cause you to believe that any change had come into her life?

A. No change, more than what a divorce would naturally bring. Are you asking about physical change or what?

Q. Yes.

A. I noticed no change physically in her.

Q. Was she lively and happy?

A. She was quite lively but moody, of course, on account of her divorce. She often was at our house in the evenings. We called her "Shoddy".

Q. Shoddy was her nickname?

A. Yes, sir.

Q. Did you observe anything mentally wrong with her in the spring of 1935?

A. No, I didn't.

Q. Did she ever express to you any concern  
198 about her child at that time?

A. She was always afraid that something would happen and she would lose her child.

Q. Did she tell you why?

A. She was afraid always that something would happen and her husband would get hold of the child.

Q. And that was in the spring of 1935?

A. Yes, sir.

Q. Did you see Mrs. Just or any members of her family after the spring of 1935?

A. Upon our return to Miami the last week in December, 1935, I think she was here at that time.

Q. Who was with her at that time?

A. She was with her aunt.

Q. That is Mrs. Bischoff?

A. Yes.

Q. Was her baby with her?

A. Yes, the baby and nurse.

Q. Where were they living here?

A. At Archway Villas.

Q. At that time did you see her quite often?

A. Quite a great deal. Our house was at 2206 Park Avenue and it was on the way down and so she often dropped in driving a car herself, to see my wife and her aunt. She always called me Uncle Frank. It was a daily matter for Shoddy to drop in the house.

Q. You would see her almost daily, is that right?

A. Yes.

Q. Did you ever see her in company with Mr. McKay, at your home?

A. Oh, yes, previously; the year before. She had spent several evenings there with Mr. McKay.

Q. They would come over and visit with you?

A. Yes.

Q. Now in December, 1935, and January, up to March 2, 1936, will you describe in a general way just her attitude on things and conditions, whether she expressed herself in a jovial or moody disposition?

A. From December until March 2nd you say?

Q. Yes.

A. Shoddy and Jack would often come over in the evening; they would be very cheerful and talkative and she would drop in in the daytime and I might be there and Mrs. Bischoff would be there; and quite often we would go out to see them at their house and take dinner there with them and they would dine with us.

Q. Did you observe any action on her part which would cause you to believe that her mentality had changed in any way?

A. I don't think so.

Q. What do you mean by you don't think so?

A. There was not any special reason for her  
200 to mentally change. She was just the same old  
"Shoddy."

Q. Vivacious and full of life?

A. Yes.

Q. A cheerful disposition?

A. Very cheerful, happy and singing; she was always doing something unusual and she was very athletic.

Q. On these occasions they came over to visit your home; did you ever observe that she was under the influence of liquor? Or had a smell of liquor on her person?

A. No, sir. We never allowed liquor to be on our table.

Q. I did not ask you that.

A. Pardon me.

Q. I asked you whether you observed any liquor on her person?

A. No.

Q. Did you ever observe on any of these visits to your home that she was in an intoxicated condition?

A. I have never seen her intoxicated at any time.

Q. This was all prior to March 2nd, 1936?

A. Yes, sir.

Q. Now, Doctor, on March 2, 1936, were you called to see Mrs. Just?

A. I was.

Q. What time of day did you call?

A. About the middle of the afternoon; I would judge about 3:30.

Q. Who called you?

201 A. Mrs. Bischoff, her aunt.

Q. What did you do after this telephone call?  
I assume that it was a telephone call.

A. Yes. I made arrangements to meet Mrs. Bischoff and Shoddy at the hospital.

Q. Were you informed where Mrs. Just was at that time?

A. I was.

Q. What were you informed as to that?

A. I was told that she had had an accident on board a yacht; that she was gassed and that she was on her way to the hospital and would I meet her there at that time and take care of the case.

Q. Would you say that was about 3:00 to 3:30 in the afternoon?

A. Yes.

Q. Were you informed who had sent her to the hospital, what doctor?

A. I may have been; I don't remember definitely about that.

Q. Did you go to the hospital?

A. I did.

Q. Who did you see there?

A. I saw Mrs. Bischoff first and then she took me to Shoddy's room. I found her lying on the bed unconscious. The nurse, Miss Dilliard, was taking care of her. As is often the case, in gas poisoning, she had had an involuntary bowel movement and she had been vomiting; she was clammy, perspiring, bluish, and was in  
202 an extreme collapse. I at once ordered an oxygen tent.

Q. Before we get to that, I would like to lead up to that. When you arrived at the hospital, did you see Dr. Spencer Howell there?

A. No, sir.

Q. Do you know who had ordered her to the hospital?

A. I understood that he had. He had been there and left, I understand.

Q. Prior to your going to the hospital, had you talked to Dr. Howell over the telephone?

A. Yes, I think I had.



Q. When you arrived at the hospital, did you see the record of Mrs. Just's case there?

A. Yes, sir.

Q. Then you saw Mrs. Just, as I understand?

A. Yes, sir.

Q. Now do you know how long Mrs. Just had been in the hospital before you arrived?

A. Not definitely, Mr. Mayne. She had been there a short time only.

Q. Now do you know how long Mrs. Just had been on the boat after she was exposed to this gas?

A. I was told by—

Mr. Parmer:

I object to what he was told. You don't know of your own knowledge?

Witness:

No.

The Court:

Objection is sustained.

203 Q. Doctor, I wish you would describe in your own language just all that you observed of Mrs. Just at the time you saw her in the hospital on the afternoon of March 2, 1936, about the hour of 3:30 P. M.

A. She was in a collapse, was perspiring; was clammy; her pulse was weak; her respiration shallow and rapid.

Q. What?

A. And rapid. Her bowels had been moving and she had been vomiting; she was a very sick girl.

Q. Doctor, did you observe, at the time you saw Mrs. Just there, any odor of alcohol on her person?

A. There was none whatsoever, absolutely.

Q. Have you ever taken care of an alcoholic case?

A. A great many.



Q. How long does an odor of alcohol remain in the human system?

A. Hours.

Q. Did you smell any alcohol on Mrs. Just? At any time that you were there in the afternoon of March 2nd, 1936?

A. No, sir.

Q. From what you observed of the appearance of Mrs. Just, are you in a position to state whether she was in a state of collapse by reason of alcoholic liquor?

A. She was not.

Q. From what you observed of her condition at the time you saw her there in the hospital, are you in a position to state what the symptoms of her collapse were?

A. Yes. The symptoms that I saw?

Q. Yes.

204

A. Or original symptoms?

Q. From what you observed; what were her symptoms?

A. The symptoms that I saw was simply an unconscious girl with a weak pulse, weak respiration, and she had a cold and clammy skin, ashen pallor.

Q. Well, from those symptoms could you determine what was wrong with her?

A. She had a typical case of carbon monoxide gas poisoning at that stage.

Q. What treatment did you prescribe, if any?

A. The first thing I gave her was a stimulant and oxygen tent. The stimulant was a continuation of what Dr. Howell had given her on the boat. We use ammonia, later on some caffeine glucose intra-veinously, and as the symptoms arose we always provided her with something to stimulate her and give her sufficient power, but at the time I saw her she was too sick to take a bath or move.

Q. Doctor, would you stimulate a patient that was in a state of intoxication by alcoholic liquor?

A. No, indeed.

Q. Would you prescribe an oxygen tent if they were already drunk or intoxicated to the degree of unconsciousness?

A. I never have.

Q. Would you do it?

A. No, indeed.

Q. Now, did Dr. Spencer Howell still continue  
205 on this case after you were there?

A. He did.

Q. How long?

A. I think during most of her stay at the hospital.

Q. You also were on the case, were you?

A. Yes, sir.

Q. Anyone else?

A. We called in Dr. Harris at that time also.

Q. Anyone else?

A. Following that, Dr. Agos.

Q. What does he specialize in?

A. Psychiatry.

Q. Who else?

A. Dr. Kennedy.

Q. Who had active charge of the case in the hospital?

A. I did.

Q. I show you, Doctor, Claimants' Exhibit 9-A, and will ask you to state whether or not that is the hospital record of Mrs. Just at the time you were taking care of Mrs. Just?

A. It is, so far as I can judge. This is a cursory examination, of course.

Q. Do you recognize the handwriting of Dr. Howell?

A. Yes, sir.

Q. Do you also recognize the handwriting of Dr. Harris?

A. I don't recognize his handwriting very much. I don't know it very well but I do know Dr. Howell was on the case and I consulted with him several times. I know him personally, very well.

Q. Is there any handwriting in this record, Claimants' Exhibit 9, in your handwriting?

A. There may be and there may not be because I usually dictated what was to be written to my assistant, Dr. Howell.

Q. Dr. Howell?

A. Dr. Howell did the writing for me.

Q. Well, did you ever give any instructions to the nurse and have her write it on the record?

A. Yes, but that was written in the order book. The instructions were always written in the order book, Mr. Mayne, and I dictated to her what to write.

Q. Look at this word, "Dr. Foxworthy".

A. This is all dictated to her at my orders.

Q. State whether or not that is in your handwriting?

A. That is my handwriting. That is my orders.

Q. Do you know who put that note on the record?

A. Probably the nurse would copy it off the order book as they are compelled to do. It simply says "Dr. Foxworthy" and I ordered it done.

Q. Did you see Mrs. Just every day at the hospital?

A. I did.

Q. I believe she was there up to March 7, 1936?

A. She was.

207 Q. Was she discharged as entirely cured?

A. She was not.

Q. Where did she go after that?

A. To her home at Archway Villas.

Q. Now on March 2, 1936, did you see Miss Grunow at that time?

A. I did.

Q. Where did you see her?

A. At Mrs. Just's home at Archway Villas.

Q. What time of day was that?

A. After I had been to see Mrs. Just.

Q. It was at night?

A. It was the latter part of the afternoon, I would judge. I may be in error, but it was the same day.

Q. Will you describe what took place between you and Miss Grunow on that occasion?

A. Miss Grunow was at Shoddy's house and I saw her and examined her there in Shoddy's bedroom. She was still in a highly excited condition; she kept saying, "I am all right"; that she didn't need any medicine and that she was perfectly all right. Her heart was quite faint, her respiration was fast and her reflex was exaggerated. I had difficulty in giving her sedatives to quiet her. She was quite abnormal. She seemed to have a repugnance to medicine of any kind. She had similar symptoms to Shoddy but not to such extent or degree.

Q. Did you observe when you saw her at Mrs. 208 Just's home that afternoon any signs indicating liquor?

A. No, sir.

Q. Did she smell of it?

A. No, indeed.

Q. Was she intoxicated in any way from liquor?

A. She was not.

Q. Now did you see Mrs. Just after that time; if so, where—after she left the hospital?

A. I saw her almost every day and sometimes oftener; we were in communication almost every hour of the day; sometimes in the morning and afternoon; sometimes in the evening and sometimes even during the night we saw her until she left.

Q. Please describe what you observed and what you saw on these professional visits over at Mrs. Just's home?

A. After she returned home she was given a tonic composed of iron, quinine and strychnine; she was given



luminal for the very severe headaches she had. I forgot to mention that both of these girls had these severe headaches and they were not controlled by ordinary sedatives at all. She cried very much; she wept continuously. She was very apathetic and she seemed to have recovered her asphasia, which had been present at the hospital for some time.

Q. What do you mean by this, Doctor, that she seemed to have recovered her asphasia?

A. The lack of speech; use of her central nervous system. I would like to distinguish between that and asphasia. She was examined by me almost every day.

209 I would always listen to her remarks trying to test out her mentality, but she objected vigorously to it; and she could not continue her conversation connectedly very long at a time.

Q. How was her memory?

A. Very poor; very poor on anything in the immediate vicinity, particularly in regard to time; everything was gone it seemed.

Q. Was her speech co-ordinated on any subject for any period of time?

A. No. She kept talking about Gus—that was her little boy—she was so afraid her husband would get Gus. I advised sun-baths and also sea bathing, with a nurse on, and it became so extreme that I suggested that Dr. Harris be called in consultation, and later on I was in consultation with Dr. Agos and I also took the case up with Dr. Carson of New York City, as to what was necessary to bring her out of the depression. At one time we thought of removing her from the house to the hospital but we were afraid she might try to destroy herself so we didn't do it. I did consult with the Sisters as to whether she could provide us with equipment on the first floor so there would be no danger of her jumping out of the window.

Q. Was she depressed mentally?



A. Terribly so.

Q. Did she ever indicate in your presence that she was going to kill herself?

A. She kept saying, "What is the use of it; why am I here?" She didn't say the words "kill herself" at any time or show any attempt other than say there was not any use in living. She cried all the time. You could not get her out of these fits of crying. Even if we took her riding or to a movie or took her walking, she would cry and cry. I talked to her a great deal when we were together and I asked her to please control herself, but her mind would seem a blank.

Q. Was she under the care of nurses all during this period of time?

A. I think so, yes.

Q. Now, Doctor, up to what time did you wait on her down here in Miami?

A. Up to the time we decided to send her to her home.

Q. You mean to St. Louis?

A. Yes, to St. Louis. To her home in St. Louis.

Q. Do you know over what period of time you waited on Mrs. Just?

A. You mean the exact dates?

Q. Yes; do you have any record with you?

A. I do not have any record with me but it was approximately from the 2nd of March until the latter part of April; I think she went home about the first of May; that is my recollection.

Q. During that period of time would you say that you saw her every day?

A. I think I did. I have records to show that, of course.

Q. Is it also true that you saw her more than once a day on several occasions?

A. Yes, indeed. In fact Mrs. Bischoff would be on the telephone pretty nearly every hour in the day; they were so solicitous of her condition.

Q. Did you render her a bill for services?

A. I did.

Q. How much was that?

A. Mr. Mayne, I can't say offhand but I can get it.

Q. To refresh your recollection, Doctor, was it \$705.00?

A. Something in that neighborhood.

Q. Did you also render a bill to Miss Grunow for services you performed?

A. I did.

Q. Have you any recollection how much that was?

A. My recollection is that it was a very small amount, probably \$55 or \$50.

Q. And you have been paid those items, have you?

A. I have.

Q. Doctor, who furnished the case history on Mrs. Just to you?

A. Who furnished the case history?

Q. Yes.

A. The case history was developed as the case went along in the hospital.

Q. I mean who gave you the first information concerning the case?

A. Oh, I beg your pardon. In the time of sequence, Mrs. Bischoff telephoned, that was the first thing I knew; following that comes visiting Mrs. Just; Dr. Howell, of course, and Jack McKay of course.

Q. Did Dr. Howell give you a history of the case?

A. Yes, we spent two hours talking over the history of the case on my front porch.

Q. What did he tell you about the history of the case?

A. He says "carbon monoxide".

Q. After you saw Mrs. Just, and saw her symptoms, did you reach that same conclusion?

A. Exactly.

Q. Were you satisfied with the treatment that Dr. Howell had commenced prior to your arrival at the hospital, in view of the symptoms Mrs. Just had?

A. He gave the ordinary treatment, which was successful.

Q. Were you satisfied with his diagnosis and also the treatment that he was giving?

A. Yes, sir.

Q. Did Dr. Howell ever tell you that Mrs. Just was intoxicated; that her condition was due to intoxication?

A. He did not.

Q. I mean alcoholic indications?

A. I understand.

Q. Doctor, the last time that you saw Mrs. Just, in March or April, 1936, are you in a position to state whether she was in good health mentally?

A. She was far from it.

Q. Did she have to go to St. Louis under the care of a nurse?

A. She did.

Q. Are you in a position to state whether  
213 from your observation of her after that time that she had any mental impairment?

A. I was so worried about her that I told the family that she had to be watched all the time. Her mother came from St. Louis here to assist in taking care of her. I thought she was not in good condition mentally at all; her mind was a blank; she had no memory; she was unable to concentrate on any one subject. She was continuously keeping up this terrible sing-song, "Oh, what's it all about?"

Q. Now during your observation of Mrs. Just after she came back from the hospital, did she show any interest in her child?

A. She worried about the child continuously; she kept asking for Gus; she was asking for Gus; she was afraid her former husband would try to take him away from her.

Q. Are you in a position to state whether you attributed her condition that you observed after she left

the hospital, and even while she was in the hospital, to a condition that would arise from carbon monoxide poisoning?

A. Yes, sir.

Q. And what was your conclusion on that?

A. The diagnosis is undoubtedly carbon monoxide poisoning with the sequela of symptoms following.

Mr. Mayne:

All right; you may examine.

214

### Cross Examination.

By Mr. Parmer:

Q. Dr. Foxworthy, when did you receive on March 2nd word from Mrs. Bischoff that something had happened to Mrs. Just?

A. About the middle of the afternoon.

Q. In time what was that?

A. I should judge about 3:30.

Q. You went to St. Francis' Hospital immediately?

A. I did.

Q. And when you got there you went immediately to the room where Mrs. Just was?

A. As far as I remember.

Q. That is just what we want, what you remember.

A. All right.

Q. When you got to that room you found Mrs. Just there and also Mrs. Bischoff?

A. I don't remember if Mrs. Bischoff was in the room there at the time or not. I may have seen her downstairs then but I saw her there at the hospital.

Q. You didn't see Dr. Howell?

A. I don't remember it.

Q. Then did you look over the record—the hospital record?

A. What record?

Q. The hospital record which had been made on the case.

A. Well, there had been no hospital record made so far excepting orders and excepting what is done usually at the front desk.

Q. Had orders been made out?

A. I examined the record book which is an order book. You have seen it, haven't you; you know what I mean, what I am talking about?

Q. I do know what you are talking about.

215 A. I ~~examined~~ that carefully.

Q. You examined the order book?

A. Yes.

Q. Did you see any order there which had been made by Dr. Howell?

A. Did I do what?

Q. Did you see any order in the order book which had been made by Dr. Howell?

A. They had all been made by Dr. Howell.

Q. Then you saw one, didn't you?

A. Of course.

Q. Can you remember what the order, or what orders if they be plural, were given by Dr. Howell?

A. The record would show that. It is not necessary to burden my memory with a thing like that.

Q. Do the orders given by Dr. Howell appear in the record which we have here?

A. That is for you to determine; I don't know.

Q. Well, sir, since you are the Doctor, will you please look over the record?

A. That is in the record book.

Q. I said, do the orders which were given by Dr. Howell on the first day appear in these records which have been marked Claimants' Exhibit 9-A?

A. I don't know.

Q. Did you ever look?



A. I just got through telling you that I looked  
216 at the record book.

Q. I know, but I want to know whether you ever looked at this record which is marked Claimants' Exhibit 9-A.

A. Of course.

Q. When you did look, did you find any orders given by Dr. Howell?

A. I have already told you that I can't remember separate orders. Why don't you produce the book here and look at it yourself?

Q. Please do not ask me questions.

A. I have to explain to you.

Q. Are my questions difficult?

A. They are.

Q. I will try to make them plain to you, sir. Can you tell by looking at these papers, which are marked Claimants' Exhibit 9-A, whether there are any orders written in these papers which were issued by Dr. Howell on the first day that Mrs. Just was in the hospital?

A. I have already answered that question once.

The Court:

The question is, Doctor, are you familiar with that paper right there (Exhibit 9-A)?

Witness:

I have read it and I have seen the paper.

The Court:

Now the question is: Are there incorporated in that paper any orders that Dr. Howell had given, which you saw?

Witness:

I suppose so; the nurse copies them.

217 The Court:

The question did not call for your supposition; it only calls for a straight yes or no answer. Does that paper there contain any of the orders which Dr. Howell had given?

Witness:

It undoubtedly does.

By Mr. Parmer:

Q. Is the light difficult for you, Doctor?

A. The light is most difficult.

Q. Suppose you come over here to this light.

A. (Witness goes to light.) I have not seen this order book for over a year. I still remember that there was an enema of black coffee given; I would not say this is all of the order, because it is impossible to remember things like that.

The Court:

Doctor, you and Mr. Parmer have been talking about an order book. I do not know anything about an order book. What is it?

Witness:

May I tell you?

The Court:

Yes.

Witness:

Under the rules of St. Francis Hospital, of which I have been a member of the Staff for many years, the physicians dictate or write all orders for taking care of the patient. It is just a book; it is a book that opens this way (indicating); there are no single sheets in it at all; it is a bound volume and the orders are written

in that book, and that is the book the nurse submitted to me; it is not this one at all.

The Court:

So you have not seen that here in the Court Room at all?

Witness:

No.

218 The Court:

Then the question Mr. Parmer asked you was whether you have any recollection of any language that was used in that order book, either written or dictated by Dr. Howell, as to whether that same language is incorporated in these papers as a part of this document (Claimants' Ex. 9-A)?

Witness:

You see, gentlemen, it is awful hard for me to remember over years individual items.

By Mr. Parmer:

Q. We will drop that for a moment.

A. I thank you.

Q. We will see if we can get the information in another way.

A. I hope so.

Q. Dr. Foxworthy, is it not the practice as far as the order book is concerned to have the orders first dictated into the order book and then transcribed or copied from there into the permanent records of the hospital?

A. As far as I know, it is.

Q. And you have a pretty good idea that it is, have you not?

A. I think so.

Q. Yes. Now you do remember that there  
219 was some order given by Dr. Howell which was  
in the order book, and you saw that, didn't you?

A. Mr. Parmer, I saw many orders in the order book,  
and the probability is I agreed with a good many of  
them.

Q. I don't care, Doctor; whether you agreed with  
them or not. What I am asking you is: When you went  
to the hospital and you proceeded to treat Mrs. Just, did  
you go to the order book to find out what orders Dr.  
Howell had already given before you?

A. The nurse brought the order book to me.

Q. Did you look at it?

A. I certainly did.

Q. Was there an order by Dr. Howell in it?

A. Yes.

Q. That is what I want to know. Thank you.

A. Why didn't you ask me in the first place?

Q. I am sorry. I was confused. Now, what I wish  
to know, Dr. Foxworthy, is whether this order here, at  
the bottom of which Dr. Howell's name appears, and  
which is dated March 2nd, 1936, is not the order—copy  
of the order—from the order book, as it has been trans-  
ferred and copied from the order book into the hospital  
record?

A. I think Dr. Howell should answer that question.

Q. You have no recollection?

A. It is over a year since I read that book  
220 on this case.

Q. But, if as you say it is the practice of  
the hospital to copy from the order book into the hospital  
records, such as we have here, you have no doubt that  
this is the copy before you of the thing that you actu-  
ally saw in the order book?

A. I suppose it is a copy, of course, but I can't swear  
to it.

Q. All right, very good. Any way, will you take it to the light and read it.

A. I will try.

Mr. Mayne:

At this point, I think we ought to object to this line of testimony. He is trying to search the memory of this witness as to something that appears apparently on another record that was made by someone other than Dr. Foxworthy. I do not think that is proper cross examination.

Mr. Merten:

He is examining about a record which has not been exhibited to the witness, which he has no opportunity to use to refresh his memory, to be in a position to discuss it.

The Court:

No. I think the question is proper, but I think it is misunderstood by the witness. The question is this, Dr. Foxworthy: Your attention is called to page 5, to page 7 of this Exhibit 9-G and it is specifically called to this language beginning right there and going down to the name "Dr. Howell". Now, Mr. Parmer has asked  
221 you whether Dr. Howell gave some orders, with regard to this patient, Mrs. Just, which were incorporated in an order book, and as I understand, your answer was that your recollection was that he did give some orders and that you saw them?

A. Yes, sir.

The Court:

Now, then, the question that Mr. Parmer has now asked you is to examine this language and state whether or not that is a copy of one of the orders, or the orders which were given by Dr. Howell in the book. If you



don't know, just say you don't know, but the question is for you to read that and state whether you remember whether or not that is a part of the order given by Dr. Howell?

A. I have already stated that I remember that there was an order given by Dr. Howell for a black coffee enema, in the order book.

The Court:

If you don't know whether that whole order is an exact copy of the order in the book, you have to say you don't know?

A. I didn't copy it, Your Honor.

The Court:

You are not asked whether it is an accurate copy?

A. I don't know.

(By Mr. Parmer):

Q. Well now, let's see, do you remember whether Dr. Howell had ordered an enema?

A. I remember distinctly that the nurse told me so, and she showed me on the order book.

Q. I think you say you do remember the ordering of black coffee?

A. That is my impression.

Q. Do you remember the ordering of an injection of glucose?

A. I don't remember that so well, Mr. Parmer. May I suggest one thing, please, sir?

Q. Yes.

A. The nurse complained to me on account of the multiplicity of the orders and that is why I cannot begin to remember all of them.

Q. Do you remember that sodium phosphate was ordered?

The Court:

Mr. Farmer, I don't understand your question as to whether he ordered it, or Dr. Howell.

Q. Do you remember that sodium phosphate was ordered by Dr. Howell?

A. It might have been.

Q. But you don't remember?

A. No, sir.

Q. Do you remember that an ice cap was ordered to the epigastric?

A. It may have been.

Q. But you don't remember?

A. I don't remember.

Q. Do you remember that an oxygen tent had been ordered by Dr. Howell?

A. The presumption is no, because I ordered it myself.

Q. And you do remember that it had not  
223 been ordered up to the time you got there?

A. Evidently it may have been on his order book and I may have forgotten it, and don't remember it, but there was no oxygen tent there when I first saw her, so I immediately asked for one.

Q. Well, now, before you asked for one, did you speak to Dr. Howell?

A. Well, Mr. Farmer—

Q. Please answer that question yes or no, sir.

A. How can I speak to someone that isn't there.

Q. Don't ask me questions, sir. Answer the question I have given you, if you can.

A. What was the question?

Q. Did you, before ordering the oxygen tent, speak to Dr. Howell?

A. I may have talked to him over the 'phone. I don't remember definitely the time of the day that I talked to him over the 'phone.

Q. Can you answer yes or no whether you talked to him before you ordered the oxygen tent?

A. I can't answer that definitely yes or no.

The Court:

You stated on your direct examination that you talked to Dr. Howell on the porch?

A. Yes.

The Court:

When was that?

A. The next day, in the morning.

The Court:

Q. Did you talk to Dr. Howell personally, and not over the 'phone?

A. No, sir.

224

The Court:

Q. Do you remember whether you talked with him over the 'phone before you went to the hospital?

A: I don't know definitely, Judge. I know that I was probably worried about her and that I went out to the hospital at once, and at the same time might have talked to him, before or after; I tried to get hold of him that very same day.

(By Mr. Parmer):

Q. Did you know Dr. Howell?

A. No.

Q. You had never met him?

A. No, not that I remember of.

Q. And you knew at the time that you went to the hospital to treat Mrs. Just, that he was a doctor dealing with the case, did you not?

A. I had heard his name called; I think Miss Bischoff told me first, but I am not sure about that.

Q. Well, you knew from the fact that he had put his orders in the order book that he was the doctor dealing with the case, did you not?

A. I couldn't even verify the fact right now that he signed that order; you will have to look at your order book to see.

Q. Does your answer to that question depend upon your recollection as to whether he signed the order book?

A. He probably did.

Q. I am asking you, sir, what your understanding was at that time of Dr. Howell with relation to the patient, Mrs. Just?

A. I heard that Dr. Howell had been called  
225 in an emergency to take care of Mrs. Just.

Q. Was it your understanding that in addition to being called in an emergency, he had brought Mrs. Just to the hospital and had issued orders with regard to her care, while in the hospital?

A. I didn't know at that time that he had brought her to the hospital until I got there and saw it on the book, I think; now, understand, my recollection may be wrong about that, but I do know that Dr. Howell had seen her in an emergency.

Q. But when you got to the hospital and saw the order book, you knew then that there was another doctor treating the woman, and you don't know whether you got in touch with him before you started treating her yourself, is that right?

A. I told you I tried to get in touch with him very soon after that. I don't remember "minutes", about it.

Q. Let me ask you this, Dr. Foxworthy: Would you assume to treat a patient in a hospital, if you didn't know the physician who was already treating her there and had not consulted him beforehand?

A. I certainly would; it was my own family, of course it was practically my own family. Miss Bischoff asked me to, and out of courtesy one doctor to another dictated that I talked to him. You misunderstood me, Mr. Parmer.

Q. I am trying to find out if you did?

A. I did.

Q. You say it is a matter of courtesy?

226 A. Yes, it was a matter of courtesy that I kept him on the case; she wanted to discharge him.

Q. We will find out about that.

A. Yes.

Q. You say it is only a matter of courtesy?

A. Yes.

Q. Isn't it the part of wisdom at all?

A. Yes.

Q. Sir, when I asked you whether it was only courtesy and you volunteered without my asking you that it is also wise—

The Court:

Don't argue with the witness.

Q. I don't want to argue with you at all.

A. And I don't want you to argue with me.

Q. I won't, Doctor. Why is it wise to get in touch with the doctor who has seen the case from the beginning?

A. To acquire knowledge with him, not to concur in his diagnosis.

Q. But you don't know what he advised in the way of treatment?

A. I have a general idea, of course; you forget that I talked the matter over for two hours with him the next morning.

Q. I don't forget at all.



A. All right.

Q. Sir, I do want you to read these notes made with regard to the treatment advised by Dr. Howell, and you tell us if that is not the standard treatment for alcoholics?

A. "High S. S. Enema": S. S. you understand is soap suds. I don't see why you would use that word. Black coffee is usually given by mouth for alcoholism, and not given by rectum for alcoholism. I never heard of it before in 40 years of practice.

"1000 C. C. of glucose". Now here is something. "Caff". I suppose that was "internal"; I think that is "int." I don't know whether Dr. Howell suggested that or not, but I approved of it.

Q. What is it for?

A. Not for alcoholism. "Caff. Sod. Ben.", it looks like.

Q. What does that mean?

A. I think he means "caffeine sodium benzoate". That is a stimulant itself.

Q. It is a stimulant?

A. Certainly.

Q. Isn't that used to induce respiration, Doctor?

A. Ordinarily, alcoholics have plenty of respiration. Here is something that he has crossed out and I think it is: "CO<sub>2</sub> 2½ 0 2 95% RRN for resp." The "distress" is on the next line. "Ext. of Caroid". Caroid is digested matter; it is given in other forms of stomach disorders.

Q. Are stomach disorders caused sometimes by drinking too much alcohol?

A. Why certainly, but caroid, you know, is digested matter. I don't know why he ordered that. You will have to ask him that question.

Q. Of course, I understand.

A. It looks like "1 dram in cracked ice".  
228 "Ex." or "Et."

Q. Would that (pointing) be "Mak"?

A. No, that is "Min."

Q. I can't read it myself.

A. "In one dram". No, that is "minutes". This is "q" in there. I suppose that is "qq", meaning 1 dram for 50 minutes. I would take it to be that. Isn't that "first dose"?

Q. That might be.

A. I don't know.

Q. Well, that refers, doesn't it, to this dose of caroid?

A. Caroid.

Q. That is the way in which this dose of caroid should be taken?

A. That would be the natural way to take it.

Q. Turn to the next one?

A. "Sod. Phos. 1 Oz. after stomach"—well, gentlemen, I can't read it.

Q. You know what sodium phosphate is, don't you?

A. Well, there is a modification of it. "Sod. Phos. 1 Oz. after stomach is well settled".

Q. Sodium phosphate, 3 drams after stomach is well settled?

A. No, that is one ounce.

Q. After stomach is well settled? Is that what it says?

A. I don't know.

Q. You do see sodium phosphate, don't you?

A. Yes.

229 Q. What is that used for?

A. It is a laxative.

Q. It is a little stronger than epsom salts?

A. No. Weaker, and you wouldn't give an ounce of epsom salts, would you?

Q. In the case of alcoholism you might give it.

A. I never have.

Q. But in alcoholism you give more than otherwise, do you not?

A. More than what?

Q. I say that in the case of alcoholism, you give more of epsom salts or sodium phosphate than you would in other cases?

A. No, I don't use it at all.

Q. You know, do you not, Dr. Foxworthy, that epsom salts are frequently given to cure an alcoholic condition?

A. I wouldn't call it "cure". It might relieve the lower bowel.

Q. It is used to relieve the condition, is it not?

A. To relieve the overloaded bowel.

Q. To relieve the condition caused by alcohol?

A. The overloaded bowel only, it doesn't have any effect on alcoholism. I am coming back to his request: "Ice cap to epigastric constantly". The next I think is "urinalysis stat." Is that far enough?

Q. I think you have gone far enough, Doctor, would you mind taking the stand?

A. All right.

230 Q. Well, now, when did you first get in touch with Dr. Howell, that you know of, after you began treating Mrs. Just?

A. When did I first get in touch—you mean by 'phone?

Q. Well let it be 'phone or face to face, sir, either way?

A. My recollection is not definite about the face to face proposition. I was thinking at one time that I might have seen him that night, but I do know that he and I were together probably two hours the next morning and I did get in touch with him by 'phone in the meantime, but as to the exact time, I can't tell you positively; I was trying to save the patient's life.

Q. Did I understand you to say that you thought, on March 2nd, you did get in touch with him on the telephone?

A. I think so.

Q. You are not sure?

A. I am not sure of anything.

Q. You are not?

A. No.

Q. Do you think that you got in touch with him face to face on March 3rd?

A. I know that.

Q. You are sure of that?

A. Yes.

Q. Where did that meeting take place?

A. On my front porch.

Q. Your front porch?

231 A. Yes.

Q. Did you send for him?

A. I may have.

Q. You can't be sure of that?

A. I am not sure.

Q. It is that you do not recall it, is that it?

A. I know we met; that is certain.

Q. And you had a talk about the case?

A. Yes.

Q. That talk occupied two hours?

A. Approximately.

Q. You occupied a full two hours talking about this case?

A. I said approximately.

Q. Does approximately mean not less than an hour and a half?

A. It might be one hour or it might be two and one-half hours. What difference does it make? We consulted. I kept him on the case. Dr. Harris recommended him so I kept him on the case and talked with him.

Q. Let me understand you now, sir. You say you kept Dr. Howell on the case?

A. I was put in charge of the case.

Q. Please answer the question, sir. You say you kept Dr. Howell on the case at Dr. Harris' recommendation?

A. I did.

Q. Who asked Dr. Harris to get into the case?

232

A. Dr. Howell, I understand, had called Dr. Harris before.

Q. In other words Dr. Howell asked Dr. Harris to come into the case? Dr. Howell asked Dr. Harris to come into the case to assist him. Correct?

A. I didn't ask him what for, but of course he called him for consultation.

Q. Exactly; so that Dr. Howell could consult with Dr. Harris. Is that right?

A. Why, sure.

Q. And then Dr. Harris spoke to you, and said "I want Dr. Howell to stay on the case", and you said "yes"?

A. That is approximately correct.

Q. It is what correct?

A. Approximately correct.

Q. Well, if there is anything incorrect about it, I want you to tell me now.

A. In the first place, the doctor in charge of the case has to be put in charge of the case by someone. Miss Bischoff put me in charge of the case.

Q. I understand without you repeating it, that someone has to be in charge of the case?

A. Yes.

Q. I am trying to find out who was.

A. All right.

Q. Now, at this conference which took place  
233 on your front porch, which may have lasted one hour, two hours and a half, or possibly less than an hour (and you tell me if I am wrong), you did nothing except discuss the case, is that right?



A. We talked about Mrs. Just's case entirely, and there wasn't anything else to talk about but her case, that is the reason he was there. Some other subject might have been mentioned; that is true.

Q. I see, that is all. Now after that did you have any further conferences with Dr. Howell?

A. I had a number of conferences following, and I may have seen him, I don't remember. May I go into a little bit of testimony on what—

Q. I would be perfectly willing for you to do so if you would first answer my question. I want to know whether you had any conferences with him that you know definitely about?

A. We had conferences over the 'phone.

Q. On the 'phone?

A. Yes, and I am trying to explain it to you, sir, that Dr. Howell was suggested by Dr. Harris, or maybe at my suggestion. I don't remember who did so, but I was to see the case in the morning or in the day and he was to take care of my work at night.

Q. Who was to take care of your work?

A. Dr. Howell was to take care of Charlotte so I wouldn't have to go to the hospital at night.

Q. And in that sense he was assisting you?

A. Well, we were associated together; it is immaterial what word to use.

Q. Please let me know, sir. You say you  
234 were associated together. Do you mean when you put it that way, to deny that you had charge of the case and that he was working for you?

A. I stated that once.

Q. Now which is it?

A. I said that I had charge of the case. Your records should show that. Why bother me with that? I wanted to get the girl well.

Q. We will get to that. Now, did you have some conferences in the hospital, not over the telephone, and

if you did have them, tell me on what dates if you can?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Now, don't you remember this, sir: That Dr. Howell, as soon as he found you were issuing orders in the case, objected to your further interfering in his treatment of the case?

A. Your Honor, may I ask for a little explanation of that question; I don't understand it.

The Court:

I think the question is plain, whether there was any disagreement between you and Dr. Howell about the treatment?

A. The disagreements out there were slight, but the case got well; that was the main thing.

Q. Read him the question.

235 (Thereupon the preceding question was read by the Reporter as follows:)

Q. Now don't you remember this, sir: That Dr. Howell, as soon as he found out you were issuing orders in the case, objected to your further interfering in his treatment of the case? You don't remember?

A. He may have done so. I don't remember.

Q. Do you mean that such a circumstance could escape your mind in the space of a little over a year?

A. I have answered the question once, I believe.

Q. Well I am trying to test the credibility of your statement, sir. I will ask you to answer the question.

A. I said I don't remember.

Q. And that is all you care to say?

A. Yes.

Q. Don't you remember this: That Dr. Howell said "you would either stop interfering with his treatment of the case or he would withdraw"?

A. I don't remember that.

Q. Don't you remember that you were countermanding the orders which he was giving?

Mr. Mayne:

I don't think that is proper cross examination. He is assuming certain things not in evidence. He can't ask this witness what Dr. Howell might testify to. He can ask Dr. Howell whether those things happened but he can't ask this witness what Dr. Howell did, so far as this witness is concerned.

236 Mr. Parmer:

I can ask this witness what came to his attention.

Mr. Mayne:

You didn't ask that.

The Court:

I think the question is proper; he is asking what was done between him and Dr. Howell; he is not asking what Dr. Howell independently did in the treatment. The objection is overruled.

A. It may have been that I stopped certain drugs or something like that, it is true; I had that power.

Q. Whether you had the power or not, did you do it?

A. May have done it.

Q. Do you remember that you did?

A. I said I didn't remember.

Q. The time to which I refer, sir, was during the five days that Mrs. Just was in the hospital and when you were engaged in treating her and so was Dr. Howell.

What I want to know is during that time; did you countermand, or did you not countermand some of the orders which were given by Dr. Howell?

A. I may have done so. I can't remember any unusual order; I can't remember any individual order; that is impossible.

Q. That is, you can't remember if you did that?

A. I can't remember definitely, no.

Q. All right. Do you remember, or did it come to your attention in any way, that Dr. Howell objected to that?

A. It might have, just offhand now, I can't remember any individual case. I know that Miss Bischoff and I were in constant consultation daily with regard to the case.

The Court:

You are asking him what?

237 Mr. Parmer:

If Dr. Howell objected to Dr. Foxworthy countermanding his orders?

The Court:

In a conversation with Dr. Foxworthy?

237 Mr. Parmer:

Yes.

A. I don't remember that at all.

Q. Now, sir, do you remember an occasion during those five days, when you came to Dr. Howell, and you said to Dr. Howell in words or substance: "I don't want you to object to my continuing with the treatment of Mrs. Just, there is no reason why we two doctors could not work together; this is a case where I am going to recommend to Mrs. Just and her aunt that a suit be

brought against Henry Yeiser and his insurance companies, and there is a likelihood of collecting a great amount of damages and that we as doctors can participate in the recovery." Did you approach Dr. Howell and say that to him?

A. I did not.

The Court:

Now where do you aver that the conversation took place, Mr. Parmer, that you refer to?

Mr. Parmer:

In the hospital.

The Court:

On what date?

Mr. Parmer:

The date, according to my recollection, as I understand, was on the third or fourth day after she was there. If you wish me to be more precise, I will step out in the hall and find out.

238 The Court:

I think that is sufficiently definite. He has already answered it.

Mr. Mayne:

It would be about the 5th or 6th of March?

Mr. Parmer:

Just about.

Mr. Mayne:

All right.



Mr. Parmer:

Q. Do you remember that you had some conversation with Dr. Howell about getting together on the case and not opposing each other?

A. Well, Mr. Parmer, I don't remember your suggestion like that, at all. I wanted harmony, of course. I try to get harmony every time I go into consultation.

Q. Well I want to know whether there was a conference between you and Dr. Howell in order to bring about that harmony?

A. We had a conference, it is true, on my front porch; of course, it was harmonious.

Q. Was the purpose of that conference, as you understood it at the time, to bring about harmony which was absent before the conference?

A. Why certainly it was to promote harmony.

Q. Was it to promote harmony by reason of any absence of it before?

A. Not necessarily.

Q. Sir, was it at all, never mind "necessarily"?

A. I had never seen the man before.

Q. I didn't ask you that. I am asking you  
-239 whether the purpose of this conference which you say took place on your front porch, was to produce harmony which was absent before the conference took place?

A. It was for harmony only.

Q. Did you want to produce harmony because there was no previous harmony before?

A. I always want to produce harmony.

Q. Will you answer my question.

A. I understand what you are driving at.

Q. I want to know whether, according to your understanding before this conference took place, there was some trouble between you and Dr. Howell?

A. Would you undertake to—

The Court:

I think, Doctor, it would be better if you didn't ask Mr. Parmer any questions. If you want to explain something after an answer, you can do so, but you are not allowed to ask Mr. Parmer any questions.

A. May I explain, please, sir?

Q. Of course you can explain.

A. I want to say what Dr. Howell—

Q. Answer the question first.

A. I want harmony in every case, why not? I had never seen the man before. Why should I want harmony?

Q. I understand that of course you wanted harmony but I am asking you, sir, whether before you had the conference you knew that there had been some trouble between you and Dr. Howell?

A. There has never been any trouble between me and Dr. Howell.

Q. That is the answer?

A. Sure, why didn't you ask me in the  
240 first place?

The Court:

I think you provoke argument by your comment on answers.

Mr. Parmer:

I am sorry, it is a bad habit; I agree with you.

Q. Doctor, before you came to Miami, you had engaged in what you call insurance medicine?

A. Yes.

Q. And that included accepting retainers and doing work for insurance companies which were engaged in defending on behalf of insured people suits on account of personal injury?

A. Mr. Parmer, insurance medicine, may I explain, please, sir, is not all legal; you know it is not all Court cases. I have acted as medical examiner and as medical referee to the medical director in my younger days; I didn't get into very many of the large cases but I was acting as medical director and medical examiner and that is insurance medicine. Later on, I have been doing work for three insurance companies.

Q. Are you through, sir?

A. Yes.

Q. Now, will you tell me, while you were in Miami, were you engaged in the practice of insurance medicine?

A. I have done some insurance work here.

Q. Did you say on your direct examination that while you were in Miami, that you represented or did work for 70 insurance companies?

A. Yes.

Q. In connection with that work, did you do  
241 work for insurance companies which were insuring people against liability on account of personal injury?

A. Yes; this was life insurance.

Q. Do you mean by that, that all of your work in Miami was done on account and for insurance companies?

A. Well, I think so. Now I am not sure about that. I have been employed by so many companies I have forgotten them.

Q. Well did you make examinations in connection with cases which were being prepared for trial?

A. What kind of cases are you talking about?

Q. Well, tell me first whether you made examinations in connection with any cases which were being prepared for trial?

A. I am talking about life insurance. I am not talking about disability insurance at all; I am talking about life insurance.

Q. I appreciate that you are, sir, but I want to know whether you did prepare for testimony in any cases that went to Court?

A. I have been in Court before. I don't remember the exact cases though; I will be glad to furnish you with that information.

Q. Thank you. What I want to know now is whether you did in any one case, examine somebody and that case was a case in which someone was claiming damages on account of personal injuries?

A. Whether I examined a case for personal injury? Do I understand you right or not?

Q. To be perfectly precise, whether you examined on behalf of an Insurance Company, some person who had been injured as a preparation for a case which was being maintained to recover damages on account of that personal injury?

A. Mr. Parmer, I have examined lots of cases that have been disabled; they may have taken it in Court later on and I may not know about it. I have examined lots of disability policies with a disability clause.

Q. You are referring now to a disability clause in life insurance policies?

A. Yes, indeed.

Q. I am still trying to find out, sir, whether any of your examinations were in connection with people who had claims, made suits against an insured covered by an insurance company for whom you were working?

A. Well, if I get you, Mr. Parmer—I am awfully dumb—I am sorry. Do you mean by examining, to prepare a case for Court, or not? Is that your idea or what?

Q. My idea, sir, is simply this: You know what a Court case is, you know what that is, don't you?

A. Sure.

Q. All right. Do you know what a case is, where one person sues another for personal injuries?

A. Of course.

Q. And you know the situation where the defendant is covered by an insurance company, don't you?

A. Yes.

Q. And you know that in the process of  
243 handling that claim, or if it becomes a suit, handling the litigation, the Insurance Company wants to find out how badly injured the plaintiff is?

A. Yes.

Q. And in the course of its business, the Insurance Company will demand and obtain a physical examination of the plaintiff, you know that, don't you?

A. Oh yes.

Q. And in order to obtain that, they will employ a doctor, you understand that?

A. Yes, sir.

Q. What I want to know is whether you were that doctor?

A. I have told you that I have had several hundred cases of disabled people, but whether they got to Court or not, I do not remember any individual case now.

Q. I didn't ask you whether they got to Court or not. I want to know whether there was any such situation that you were ever hired by the Insurance Company to make such examination?

A. I don't remember a single case of that character.

Q. Were you ever appointed by a Court to conduct a physical examination of a plaintiff in a damage suit?

A. Plaintiff in a damage suit?

Q. Yes.

A. I have been appointed by the Court a number of times as to whether infection resulted or something like that, or whether the man was as sick as they thought he was, but I don't remember being appointed by the Court in such a situation as you describe.



244 Q. I did not describe any particular situation. I just asked you whether it was a suit pending for damages and the Insurance Company interested in the suit petitioned the Court for a doctor to examine the Plaintiff?

A. I may have done so.

The Court:

By order of the Court?

A. I don't remember exactly. I just don't remember exactly.

Q. Honestly, you mean?

A. I should but I don't get it through my head; any single case I have been in of that character. You may be able to dig up some cases against me, I don't remember at all.

Q. You are perfectly safe. I won't.

A. Thank you.

Q. Well, now, did you advise Mrs. Just, or her aunt, while she was here, to bring suit against Mr. Yeiser?

A. I did not.

Q. Did you advise her to bring a suit against the Insurance Company?

A. I did not.

Q. Well tell me, Doctor—when you saw Mrs. Just you say she was having a movement of the bowels?

A. Yes.

Q. Well now, would the sodium phosphate that Dr. Howell ordered for her, produce that?

A. Well now what would produce that, I don't know.

245 Q. I said would it produce that, sir? Will you please answer my question?

A. Yes.

Q. Would sodium phosphate produce a movement of the bowels?

A. It usually does. Of course, if taken in sufficient quantities.

Q. If taken in sufficient quantity?

A. Yes.

Q. I think you said that the quantity down there was certainly sufficient to move mountains?

A. I didn't say mountains.

Q. I am putting it figuratively.

A. All right.

Q. Did you say, on direct examination that Mrs. Just was bluish?

A. She had a pallor,—a bluish color.

Q. Where was she bluish?

A. Oh, around the face.

Q. And the lips?

A. Just the ordinary pallor that comes after a person has been vomiting severely.

Q. Well now, Doctor, I think we both know  
246 the difference between pallor and bluish—you appreciate that there is a difference, do you not?

A. I do. I prefer to say pallor; often it is whitish tinted and often it is whitish with a bluish tint; that's true.

Q. Whitish with bluish tint?

A. It may be.

Q. I would like for you to tell us just what it was in Mrs. Just's case; tell us where she was bluish and where she was whitish?

A. My general impression was that it was just the face; I didn't specify any individual spot. I was interested in keeping her alive and things like that.

Q. You mean to say that you cannot tell us where she was whitish or bluish?

A. I said her face.

Q. You mean part of her face was white and part bluish?

A. Her face.

Q. My question, sir, was do you mean that parts of her face were white and parts blue?

A. The general impression I got was an ashen pallor, or bluish tint of the face.

Q. Of the whole face?

A. I don't want to specify any individual part.

Q. Did you notice the lips?

A. Of course, but what my observation was I cannot remember offhand.

Q. You can't remember, but the general impression was—

A. She was clammy; that is the usual condition where the skin is cold and perspiration has taken place—it is clammy to touch.

Q. Cold and damp, is that what that means?

247 A. Yes, sir.

Q. Have I outlined all that you can remember about how she appeared when you looked at her for the first time; that she was clammy, that she had a bluish-white color to her face. Is that all you can remember?

A. No, there are other things.

Q. You tell us the other things you can remember?

A. You must understand that the first thing of all when I saw the case was to take care of the exact situation as it appeared. The coffee enema had moved the bowels; the thing that moved the bowels was the enema of black coffee—

Q. Will you please answer my question.

A. She was unconscious.

Q. She was unconscious: what else?

A. Her pulse was weak; her respiration was weak.

Q. Pulse weak?

A. Yes.

Q. When you say it was weak what do you mean?

A. The quality.

Q. Do you mean when you say it is weak in quality that it is difficult for a doctor to perceive it?

A. By touch.

Q. Of course that is the way you find it?

A. Yes, sir.

Q. Then when you put your hand on her wrist it was hard for you to tell it; right?

A. Yes.

248 Q. Is that what you mean?

A. I mean that the quality of the pulse is the amount of blood flowing through it, the feel of the pulse; in other words, it is its slowness or rapidity that I am talking about.

Q. You mean that it is weak in the sense that it is difficult for you to feel it by palpation?

A. Yes, exactly.

Q. How was the pulse with respect to rapidity?

A. My memory is in doubt about that. Your chart will show it there.

Q. Where did you look at the chart last?

A. You mean this chart here?

Q. This one, the one in evidence that you just referred me to.

A. I haven't carefully examined that chart for some time; I do not remember exactly when the last time was, but the quality of the pulse is what I meant. The rapidity is not so important.

Q. Let's not argue about it.

A. All right.

Q. I understand that you have added "unconscious" to the weak pulse and the matters that I mentioned?

A. Yes. My recollection is that the blood pressure was lower than normal.

Q. Lower than normal?

A. And the temperature might have been sub-normal.

Q. Do you have any recollection of what it was?

249 A. My recollection is that the temperature was slightly sub-normal. At different times it was above normal.

Q. I just want to know what it was when you first saw her.

A. That is my recollection.

Q. Slightly sub-normal?

A. Yes.

Q. Now in a woman what is the temperature that is slightly sub-normal?

A. What is your idea of normality?

Q. I want you to tell me, doctor.

A. From one to say five over ten is slightly below normal.

Q. Five over ten is below normal?

A. Yes.

Q. Is slightly sub-normal?

A. Yes, sir. It is a minor thing really and truly when it comes to a patient's life.

Q. As a matter of fact pulse temperature differs within the limits that you mentioned?

A. Yes; that is the reason I said slight.

Q. What would be a low blood pressure in a woman?

A. To answer your question as to what would be a low blood pressure in a woman would depend on a number of factors. I suppose you mean normal blood pressure, because most women are normally lower than men, from five to ten degrees lower.

Q. What blood pressure is normal in a woman the age of Mrs. Just?

250 A. At her age and her build and all it would probably be, you might say, 112 or 115 maybe, but not as much as a man as a rule.

Q. Her normal blood pressure would be 115?

A. It might be.

Q. And it might be somewhat higher?

A. Of course it might be higher.



Q. And still be normal?

A. Very true, Mr. Parmer, but I want you to—

Q. I want you to answer the question, sir.

A. Authorities differ on that. I want to discuss the normal blood pressure with you because authorities—

Q. You rather withdraw the answer that you made, that her blood pressure was low?

A. I didn't say low; I said it was slightly lower than normal.

Q. We will take it that way.

A. All right.

Q. Do you want to withdraw that answer?

A. No.

Q. Let's find out what you mean by low blood pressure in the case of a woman of Mrs. Just's age; let's find out what is the normal blood pressure; what are the limits for normal blood pressure for a woman of Mrs. Just's age?

A. Probably from 110 up to 120. I am talking about systolic.

Q. I understand.

A. I wouldn't worry about either one.

Q. It could go up to 130, couldn't it?

A. Not necessarily at her age.

Q. It could go up to 125?

251 A. I would rather not put any further answer to that.

Q. You have heard of the old rule of 100 plus your age?

A. Yes, that is a very old rule.

Q. Is that rule wrong or—

A. It is not used nowadays.

Q. It is wrong then?

A. It just isn't used.

Q. Could it have been below 110 and still be normal?

A. I have answered that, Mr. Parmer, and I do not care to go into it any longer.

Q. All right; was there anything else that you noticed about her condition?

A. There may have been other things but I have forgotten.

Q. You have forgotten?

A. I have already put them on the chart; they are there on the chart.

Q. Now, doctor, I want to know which of these symptoms that you saw at the time and that you can remember now indicated to you that Mrs. Just was suffering from carbon monoxide poisoning?

A. Which of the symptoms?

Q. Yes.

A. In the first place I didn't see Mrs. Just when she was poisoned; I didn't see her until hours afterwards, and necessarily you understand that it was too late to make any tests on Mrs. Just that are usually made. It is true she had urinalysis made and she had her blood pressure taken and she had a blood examination made, but it was too late to do these things that should have been done at the start. I said "should", but I will say that is usually done.

Q. What test, sir, by which you determine whether a person—

A. Let's not go into that; let's not go into chemistry, as I am not an expert on that, but I will be glad to read it to you.

Q. Do you know what is the test to determine whether a person is suffering from carbon monoxide poisoning?

A. I happen to know that but I am not an expert on it.

Q. Do you know it?

A. Yes. Anybody that ever treated a carbon monoxide case would know the ordinary tests, and I can refer you to all the authorities you want.

Q. I don't want to find out what the authorities know. I want to find out what you know and I would be obliged if you will tell me right now.

A. I am not qualified as an expert at all.

Q. Do you mean to say that you don't know?

A. I know it, and I am simply telling you that—

Q. Please tell us.

A. The simple test is to take a test tube with water in it and blood, and when you shake it you get a bright cherry-red color, and that partly disappears according to some authorities in two hours, some less and some more than that. I am not qualified as an expert on that. These things I pay other people to do for me, but it was too late when I saw Mrs. Just.

253 (By Mr. Parmer):

Q. The way you understand the test is made is to take some blood, put it in a tube and add water to it and shake it?

A. If Your Honor please, there are five different kinds of tests. I don't want to go into that; I am not a chemical expert; I can refer him to authorities.

Mr. Mershon:

We object to that line of examination. because it is immaterial and irrelevant.

Mr. Parmer:

It is not at all.

Mr. Mershon:

I submit, Your Honor, that the question does not relate to any tests which may be made eight to ten hours after the victim has been discovered. Now the test that Dr. Foxworthy mentioned was one that must be made while the carbon monoxide is still in the blood or before eliminated to some extent by the use of oxygen and the other methods.

Now if counsel will limit his question to tests that may be made after the time Dr. Foxworthy saw the

patient, I think it is relevant here on cross examination, otherwise any examination about tests is irrelevant and not proper cross examination unless it refers to tests that could be made at the time Dr. Foxworthy saw this patient.

Mr. Parmer:

Of course I am referring to the tests which were possible.

Mr. Mershon:

And it is irrelevant here because no tests were made; there is no evidence of the making of any tests whatsoever.

254 The Court:

I understand Dr. Foxworthy to say that it was too late to make certain tests, and then on top of that Mr. Parmer asked him what are the tests to discover whether the patient is suffering from carbon monoxide, and he says he knows the tests but he prefers not to go into it, and Mr. Parmer insists that he give what the tests are. He has given one.

The Witness:

Your Honor, I am simply trying to avoid going into an expert chemical analysis and all of that stuff. I am no chemist. I employ people to do that for me. It requires formulae to work these things out. I know it, but why go into it; I am no expert on that.

Mr. Mershon:

Let him state the general nature of the tests.

The Court:

Yes, but it makes his answer seem incomplete when he says, "I know it but I prefer not to go into it"; then

when Mr. Parmer asks him to give it he says he prefers not to go into it. If he can describe it I think he should; if it is something that leads into an intricate analysis of chemistry that we don't understand—

The Witness:

It does, Your Honor.

The Court:

What are the tests?

The Witness:

There are various tests.

255 The Court:

What are they?

The Witness:

(By Mr. Parmer):

Q. You knew that much about all of these tests but you say it was too late to perform them. Did you know that much?

A. How much?

Q. That at the time you saw the patient it was too late to perform them?

A. I would not say all of the tests, because we ordered a blood analysis and urinalysis.

Q. Do you know any of the tests which could have been performed when you saw her, notwithstanding the time which had elapsed?

A. These tests should have been made at the very first, consequently, if they are not made it is too late, because the carbon monoxide has left the blood.

Q. Do you know any tests which could have been performed by you at the time you saw her to determine whether she had carbon monoxide in her blood then?



A. Some of those tests could have been used even to the extent of ten days or more; the spectroscope probably would.

Q. You say the spectroscope could be used ten days afterwards?

A. Probably.

Q. Do you know definitely?

A. No, I don't know definitely.

Q. Do you know—

A. I am not a chemist; I told you that—

Q. Is your answer that you don't know because of not having read it or you don't know of any test which could have been used at the time that you saw her to determine whether she had carbon monoxide in her blood?

A. I do not remember any tests that would be always true at that time.

Q. Did you form an opinion at the time you examined Mrs. Just on the first day that her condition was the result of carbon monoxide poisoning?

A. I did.

Q. Did you form that opinion from an examination of Mrs. Just?

A. Partially.

Q. Partially?

A. Yes, sir.

Q. And partially from the record which had been made by Dr. Howell?

A. Partly.

Q. Those were the two things—

A. I concurred in his diagnosis, if you will read the record, of carbon monoxide poisoning.

Q. But it is written carbon dioxide, is it not?

A. I think I read that "carbon monoxide". I may be wrong about it. Sometimes doctors slip a little bit.

Q. Perhaps it was a slip, sir, but did you slip in reading it, sir, that it was CO<sub>2</sub>?

A. I don't see CO<sub>2</sub>. I thought you were reading down here in the body (indicating).

Q. All right, let's look at the body, sir, over in the light.

A. I think you will find it here (indicating).  
Q257 That looks like "CO<sub>2</sub>" up there.

Q. Now do you see this here (indicating); will you read that?

A. It says "apparent".

Q. Apparent what?

A. "Apparent CO<sub>2</sub>", which he evidently meant. What is this word here—is it "poisoning"?

Q. It seems to be, sir.

A. Some of these words here I can't read distinctly, but I am sure I spelled—

Q. You were reading on page 9?

A. I don't believe it was that far back.

Mr. Mehrtens:

I can find it for you, I think, if you will let me.

The Court:

All right.

Mr. Mehrtens:

Here it is right here (indicating).

Q. Right here (pointing).

A. You see he has "mono" spelled out.

Q. Will you just take the stand again?

A. All right.

Q. That, sir, is a note by Dr. Harris, is it not?

A. Yes.

Q. Which was not there at the time you came in to see Mrs. Just on the first day?

A. I suppose that was Dr. Howell; I am not sure of his initials; does it show who it is?

250 Mr. Mayne:

We will concede that it is Dr. Harris.

Mr. Parmer:

Counsel concedes that Dr. Harris was the doctor writing "carbon monoxide".

Mr. Mayne:

We will concede that it is Dr. Harris' handwriting.

(By Mr. Parmer):

Q. Dr. Harris saw the patient after you did, isn't that so?

A. Yes.

Q. So you did not have the benefit of Dr. Harris' statement that it was carbon monoxide poisoning at the time when you came to your conclusion that it was carbon monoxide, did you?

A. No.

Q. And all that you had was something written by Howell and all he had written was "carbon dioxide", is that right?

A. No, sir.

Q. Well, let us see—

A. You assume you too much. I did not make my diagnosis from that chart at all.

Q. You didn't even see it?

A. I did not say that. You are putting words in my mouth. I talked my diagnosis over with Dr. Howell, by conference with Dr. Howell, and he agreed in it; don't you see you are putting words in my mouth?

Q. Do you mean to say that on March 2 when you went and examined Mrs. Just in the hospital you came to the conclusion that she was suffering from carbon monoxide poisoning as a result of a conference held with Dr. Howell that day?

A. Partially.

259 Q. Partially?

A. Yes, I checked though before.

Q. Didn't you tell us already that the conference that you held with Dr. Howell was on the next day?

A. Well, now you are getting me confused as to what days you are trying to—

Q. You may be getting confused, but I am not doing it.

A. You are doing it. I have told you distinctly, but if you will stop trying to confuse me, stop trying to mix me up, and will look at your record, you will get what you want,—

Q. What I am trying to find out is you say that you came to the conclusion on the first day you saw this woman, came to that conclusion?

A. Yes.

Q. That she was suffering from carbon monoxide.

A. I did.

Q. And you say you were aided in that conclusion by examining Mrs. Just and by something that Dr. Howell had said; right?

A. Yes.

Q. Now I want to know whether you had had a conference with Dr. Howell at that time or not; had you?

A. Well, now what do you mean by "that time"?

Q. At that time you completed your examination of Mrs. Just and came to the conclusion that she was suffering from carbon monoxide.

A. I told you I had my conference the next morning.

Q. Therefore the only contact you had with Dr. Howell's opinion in the matter was that contained in the record which he had made?

A. No, not at all; you forget that I talked with him over the phone.



Q. Are you sure that you did?

A. I think I did; I am not sure of anything, but I am sure as far as I can remember.

Q. Then you think you had a 'phone conference with him?

A. Yes.

Q. And you are sure you had a 'phone conversation with him?

A. I am sure that I did. I was worried about getting Charlotte back to life, and I was doing my best, and the 'phone may have been busy; my wife tried to get him by 'phone—I know that.

Q. You could not have had the 'phone conversation with him at all—

A. We had it.

Q. On the day that she went to the hospital?

A. Yes, but let's get back to the patient.

Q. What does a person look like when they have been overcome with carbon monoxide gas?

A. You are not referring to this case at all?

Q. No; when they come out of a place where carbon monoxide is, come out unconscious.

A. You want to know their symptoms?

Q. I want to know what their appearance is when they come out unconscious.

261 A. When they come out unconscious quite often there will be red spots on the face, even the body at different places, and the pupils of the eye may be dilated or not.

Q. Or not?

A. Yes; they may be dilated or not. Of course there is a headache that goes with it, but if the patient is unconscious he wouldn't know it necessarily. Some of them have garlic odor on the breath.

Q. In speaking about the appearance did I understand you correctly that sometimes there are red spots and sometimes they are not?

A. Yes.



Q. And sometimes there is pallor and sometimes not?

A. Yes.

Q. Is there anything about a person who is overcome by carbon monoxide gas which stands—

Mr. Mehrtens:

Counsel is asking for symptoms here. If counsel will make his question a little more specific perhaps the doctor can give him a little more specific statement.

Mr. Parmer:

I certainly could not be more specific when I asked the doctor to assume—

Mr. Mershon:

We object to the question, if Your Honor please, that the question is not specific.

The Court:

I will overrule the objection. I think the question is proper. That will be a matter for re-direct examination. You may proceed.

262 Mr. Parmer:

I do not quite understand you.

The Court:

I am allowing you to ask the witness questions as to the physical appearance of a person affected with this gas.

Mr. Parmer:

Then you allow me to—

The Court:

To test his knowledge of carbon monoxide and its affect on the human body from a hypothetical standpoint.

Mr. Parmer:

Very well.

The Court:

But he has said in his examination clearly that when he examined her these tests could not be made, that the time element prevented it. Now then your last question was apparently directed to ask him why the conditions which he explained existed hypothetically were not present at the time of his examination.

Mr. Parmer:

That is what I was leading up to, Your Honor. The first thing I want to find out is whether he would agree that in every case of unconsciousness—

The Court:

You may proceed along that line.

The Witness:

They surely have red spots.

(By Mr. Parmer):

Q. I want to know from you whether they usually do or whether they always do.

A. I haven't seen all of them.

Q. And if they are that way how long does that condition continue?

A. Sometimes fifteen minutes and sometimes longer.

Q. It varies?

263 A. It varies, but not very long.

Q. Have you in your experience treated or seen cases recently exposed to carbon monoxide gas?

A. I have.

Q. How long have you seen them after the exposure ended?

A. How soon have I seen them after the exposure ended?

Q. Yes.

A. I don't understand you. What are you driving at?

Q. I mean how long after a person came out of the place where they were being affected by carbon monoxide gas did you see them first?

A. I am sorry; I am awfully dumb; are you talking about red spots now or when I saw the patient?

Q. I am asking you how long after a person who has been exposed to carbon monoxide gas has been removed from the atmosphere where the carbon monoxide gas was did you see the patient?

A. Sometimes I have seen them within ten minutes. I had one case right across from my place and I saw that patient inside of ten minutes.

Q. And in that case was the person red?

A. I don't remember.

Q. Well, did you ever see any person who had recently been exposed to carbon monoxide gas after being unconscious whose complexion was red?

A. Yes.

264 Q. And that person in that case,—how long after the exposure to carbon monoxide gas did you see the person?

A. That has been sometime ago; I don't remember the exact time, but it was a question of minutes; it wasn't very long.

Q. Well, was it an hour afterwards?

A. It may have been.

Q. It may have been two hours?

A. It may have been two hours.

Q. You do not have any definite recollection of that at all?

A. I do not have any definite recollection of that at all.

Q. Now, Dr. Foxworthy, when you were treating Mrs. Just in the hospital did you give her some sedatives?

A. I did.

Q. What sedatives did you give her?

A. The records will show you.

Q. If the records will help will you please use them?

A. I would rather tell you first now and save time.  
Both Dr. Howell and myself—

Q. I asked you what sedatives did you give to her, leaving Dr. Howell out of it, please.

A. Luminol was one. I think I am right in saying that at different times I used sodium bromide, but whether it was at the hospital or at the house, I don't know; in fact her headache was so severe that I maybe used morphine once or twice; I may have used some other sedatives that did not have a good effect, and I may have used some phenol barbital, I think it was, but  
265 all of this should be on the hospital chart.

Q. You favored strongly the use of sedatives in this case, did you not?

A. Yes, indeed.

Q. You also favored very strongly the use of sedatives in the case of Miss Grunow?

A. I favored it; I didn't favor it strongly; I made the suggestion that she take it.

Q. Did you prescribe sedatives?

A. I did prescribe sedatives, yes.

Q. Now in your treatment of Mrs. Just after she left the hospital you say that she had recovered from her aphasia that she showed in the hospital?

A. Yes.

Q. I think you said by that you meant she had recovered speech?

A. Oh, yes.

Q. In other words in using the words "aphasia" you mean that she had some impediment which prevented her from speaking, is that correct?

A. I explained that this afternoon. It is a cerebral matter; the trouble was in the central nervous system, causing the impediment of speech; the trouble would be the central nervous system.

Q. What you mean by "aphasia" was something wrong with her speech, is that correct?

A. Aphasia and afono are both loss of speech, 266 aphasia being due to the central and nervous system region.

Q. I want to know about aphasia. Did you use the word aphasia to mean loss of speech in any respect?

A. I did.

Q. Is that what it means?

A. Sure; not in any respect, but just in one respect.

Mr. Mershon:

I will ask the Court to instruct the counsel that the witness wants to explain what he means by "afono" without interruption of counsel.

The Court:

All right, do that, Doctor.

The Witness:

It means loss of speech due to a lesion in the central nervous system.

The Court:

Is that all you want to explain about that?

The Witness:

Yes.

(By Mr. Parmer):

Q. Did you ever hear it used to mean lack of memory?

A. Lack of what?

Q. Lack of memory?



A. No, sir.

Q. Now did Mrs. Just object continually to the examination you were making of her?

A. She was irritated by them; everything irritated her.

Q. Did you say she could not understand why this treatment was going on?

A. She was irritated by everything; she would  
267 not understand it, and that would be taken for granted.

Q. Did she object to being under medical care?

A. More or less, yes.

Q. Did she say she didn't think she needed it?

A. Oh, I don't remember that at all.

Q. Well, you mean to say that she didn't say that?

A. I don't think she did.

Q. Now you wanted to remove her to the hospital, didn't you?

A. Yes.

Q. To some institution.

A. Are you referring to the time after she left the hospital?

Q. After she left the hospital and you wanted to remove her again to an institution.

A. At one time there was some danger of her injuring herself, and we thought she would have competent supervision in some hospital or institution where she would be taken care of better.

Q. Didn't you want her to go to the hospital because you thought the relatives in the house there were retarding her recovery?

A. It is characteristic of these cases that they should have rest and quiet, they were in a small house and there wasn't room enough to give her sufficient attention and quiet.

Q. Didn't you have the opinion that it would be beneficial to Mrs. Just if she were not in association with the mother and the aunt in the same house who were too solicitous of her welfare?

A. I recommended her to be sent some place  
268 where she would be very quiet and have complete rest.

Q. Didn't you think that the mother and the aunt who were in the same house with her deprived her of the rest that she needed?

A. The mother and the aunt?

Q. Yes.

A. Not necessarily.

Q. Well, Doctor, was that any part of your opinion at the time?

A. It may have been part; she needed rest from everybody like she would get in an institution. I didn't specify any one person. I think she was worrying about the child; I think that probably was the main thing.

Q. That worry about the child was something that she had before she ever went on Mr. Yeiser's boat?

A. Yes, but it was much worse afterwards; that was the one idea in her head.

Q. Now then before she was on the boat she expressed herself in that regard—did she tell you why she thought she might lose her child to her husband?

A. Before she was on the boat?

Q. Yes; when she expressed that idea to you did she say why she thought she might lose her child to her husband?

A. She may have but I have forgotten the details of it.

Q. Did she have a fixed idea before she went  
269 on the boat that her husband might take her child away from her?

A. Oh, she spoke of that several times.

Q. But it was not an obsession?

A. No, it wasn't an obsession at all like it was afterwards.

Q. After it became an obsession did she ever tell you why she thought she might lose her child to her husband?

A. She would simply keep asking about it; she wouldn't go into details at all.

Q. Did you try to go into details with her?

A. I may have, but I have forgotten the details now.

Q. You say that that was the main mental trouble with her, was it?

A. What?

Q. This fear that she would lose her child.

A. The main mental trouble?

Q. I don't know whether I expressed it the same way as you did—

A. It was sort of dementia paranoid resentment, and things of that kind.

Q. Maybe so, but I want to know what her main mental trouble was as expressed by her.

A. As expressed by her?

Q. Yes.

A. We did not discuss her mental trouble at all, you know.

Q. I didn't ask whether you discussed it, sir; I want to know what you observed with regard to her mental symptoms.

A. You mean my opinion?

Q. Your observations, sir, and also your opinion with regard to her mental symptoms; was the main abnormal mental system that she feared the loss of her child to her husband?

A. That was one of the main features.

Q. That was one of them?

A. Yes.

Q. Was there any other fear expressed by her?

A. I have heard her say that she feared she would lose her mind; she didn't see the reason for living; she would say, "what is the use of living; she often asked me that question.

Q. She was depressed, was she?

A. Oh, very much.

Q. Did she express herself that she was depressed because she thought she was going to lose her child?

A. That was the probable sequence, of course.

Q. And that she didn't care to live any more because she thought she was going to lose her child?

A. It may have been just like you say it, but she made the statement several times to me that she didn't see any use of living; she might not have mentioned the child in the same breath, but she always mentioned the child every time I saw her.

Q. But from your observing her mental symptoms did you find that all of these abnormal expressions of hers were, as you just stated, sequences, or "sequelae", as doctors say, of the central theme that she feared she would lose her child?

A. There is some doubt in my mind as to  
271 whether this whole thing, as you expressed it to me, is right, but it was, of course, one of the main factors, one of the main features, that is, that she would lose her child.

Q. Am I putting it fairly; I am putting it up to you—

A. But—

Q. All I want to ask you is whether I am putting it up to you fairly. I want to know all of the various abnormalities with regard to this woman's mental condition; were they or were they not what the doctors call sequela sequences of the central idea in her mind that she feared she would lose custody of her child to her former husband.

A. That wasn't the central idea; it was one of the main ideas, but you would not say the central idea; by "central" you might embrace the whole subject.

Q. I mean it was the central idea from which proceeded the other abnormal ideas?

A. Not necessarily.

Q. You don't believe it was?



A. Not necessarily. She had a brain lesion there; that might have had something to do with it, but the child was one of the principal things.

Q. You say she had a brain lesion?

A. Yes.

Q. Do you know of any mental symptoms which she did have and which you now remember which could not be regarded as a sequence from the idea she had that she might lose her child? If that is not clear I will make it clear. I don't think you understand me.

A. I don't think it is clear.

Q. I want to know if you remember any mental symptom that—

Mr. Mayne:

You mean before the accident or after?

Mr. Parmer:

After.

Q. I want to know if you remember any mental symptom that you observed that Mrs. Just had which in your opinion was not connected with her fear that she would lose her child?

A. Oh, yes.

Q. Tell us what that was.

A. Lose her mind.

Q. You mean fear of losing her mind?

A. Yes, sir.

Q. What other?

A. Failure of concentration. That is hard to explain, Mr. Parmer; I think she realized to this extent that she wasn't at times talking correctly, and she would repeat herself over and over again. Dr. and Mrs. Kennedy took her to a movie, to try to make her feel better, but she will had the depression afterwards.



Q. Tell us what the mental symptom was that you observed.

A. There wasn't any mental symptom in connection with the movie.

Q. You mean she didn't want to go to the movies?

A. She simply didn't care for the movies; she would go, but after she had been there for awhile she would leave.

Q. What else?

A. There was of course this mental repetition of ideas.

Q. Repetition?

A. Yes, repetition of speech and so on; the same thing over and over again; disassociation of ideas or disorientation. She couldn't drive a car, and things like that.

Q. She was unable to drive a car?

A. Yes.

Q. Or what else, or did you finish?

A. There were probably some others but I cannot remember them; I am getting tired.

Q. I am getting tired too, and I am going to quit. We are all going to be happy in a minute.

A. I hope so.

Q. Did you ever try her out in driving a car?

A. Did I ever try her out in driving a car?

Q. Yes.

A. No.

Q. Did you ever ask that she be tried out in driving a car?

A. Dr. Kennedy and Mrs. Kennedy—

Q. Did you?

A. Not myself.

Q. Did you ever advise that she be tried out to see if she could drive a car?

A. Yes.

274 Q. You advised that?

A. I suggested it with proper persons.

Q. Was the test tried out?

A. I don't remember.

Q. Did you observe that Mrs. Just at times, at certain times, could remember things and at other times she could not?

A. It is possible that I do, but no definite thing comes to my mind at this moment.

Q. Do you remember from your observation of her at that time that the factor of loss of memory was not constant?

A. Loss of memory not constant?

Q. Yes.

A. We tried to improve her memory, and of course she would seem to get better, so there would be probably a change in that regard.

Q. Do you remember a time that she got pretty near well?

A. Sometimes, yes.

Q. Well, sir, the physical effect caused by the combination of carbon monoxide with the blood, hemoglobin of the blood, causes it to become redder, and that is a physical fact, isn't it, in all cases that the complexion becomes redder?

A. Physical?

Q. Yes.

275 The Court:

Well, Mr. Parmer, an objection was made just now to the hypothetical questioning along the lines of symptoms and physical appearances of a person affected with carbon monoxide immediately after the inspection as distinguished from the condition of this lady at the time she was first observed by the witness?

Mr. Parmer:

Yes.

The Court:

So, while the Court has allowed you to pursue the line of questioning in a hypothetical sense, the Court will have to require that when you attempt to apply the answers obtained to hypothetical cases, that you not apply them to the physical case which we have before us. So far as testing the witness' knowledge of carbon monoxide, he has given you his version of that. The Court has allowed you to test his knowledge on that, and you may proceed along that line, but do not draw comparisons from deductions given in his answers to hypothetical questions—in other words, do not apply those answers obtained to the hypothetical questions to the conditions now before us.

Mr. Parmer:

Very well.

(By Mr. Parmer):

Q. You do know something about that, Doctor?

A. Yes.

Q. Is there consistency in the appearance of such persons?

A. Yes; they are often not consistent, as I have already explained.

Q. Now you are telling me that they are inconsistent?

A. Yes.

Q. I want to know where they are consistent.

A. They are consistent when they are unconscious; there is nothing inconsistent about that.

Q. Does carbon monoxide form and combine with the hemoglobin of the blood?

A. Yes.

Q. What is that called?

A. Called carbo-mono. Can I have a glass of water?

(Recess).

Q. Dr. Foxworthy, the name of carbon monoxide fumes when combined with the hemoglobin of the blood is—

A. Yes.

Q. And I think you said it was—

A. Carbo-mono hemoglobin.

Q. What is the color of that content?

A. Bright red.

Q. Now when the blood becomes saturated with carbon monoxide to the extent that it produces unconsciousness, doesn't it produce a bright red complexion?

A. Usually, but within the limit in time as I told you before.

Q. All right, sir, but while the carbon monoxide is in the blood, while it is saturating the blood to the point of producing unconsciousness, isn't the complexion a bright red?

A. In all cases?

Q. In other words, that you—

A. If you want to modify it a little bit, I could answer it. I cannot say definitely that it is in all cases, because it has numerous varieties. In 70 per cent. of the cases there is sugar in the urine—

Q. I am talking about the outward appearance  
277 of the person, sir; never mind the internal features. I want to find out the outward appearance of a person when such person is overcome, that is, made unconscious by carbon monoxide gas; what appearance do they have which is consistent in all cases?

A. I am simply giving you my own opinion.

Q. That is what I want to know.

A. I don't know whether it is consistent in all cases, because I haven't seen all cases. Of course, you may understand far better than I do as to what is consistent in these cases.

Q. Maybe I do, sir, but I want to know what you know about it. Do you know anything about it?

A. I don't know; sometimes I think I don't.

Q. Do you know anything about how a person looks when they are made unconscious by carbon monoxide poisoning?

A. Yes. I don't remember offhand any time that she could remember very well—

Q. Do you remember that at times she could remember things that happened on the Yacht Friendship II?

A. No, she couldn't remember that at all.

Q. Did she remember that while she was in the hospital?

A. No.

Mr. Parmer:

That is all.

The Court:

If there is any further redirect examination, I suggest that you better put it off until tomorrow morning. We will adjourn until tomorrow morning.

Thereupon DOCTOR SPENCER HOWELL, was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

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Direct Examination.

By Mr. Parmer:

Q. Doctor, are you a physician licensed to practice medicine in the State of Florida?

A. I am.

Q. How long have you been so licensed?

A. Approximate date of my license is November, 1932.

Q. What has been your medical training which preceded your being licensed?

A. I received my medical education at the University of Georgia, located at Augusta, where I spent four years;



since that time I have had various hospital connections totalling approximately three and one-half years.

Q. Are you on the staff of any hospital in Florida?

A. I am.

Q. What hospital?

A. I am on the Surgical staff of the local city hospital, Jackson Memorial, having served also on the Medical, Orthopedic and Tubercular staffs.

Q. Of that hospital?

A. At the same hospital. I am also on the Visiting staff of all Grade A recognized hospitals in this area, namely Jackson Memorial, Victoria, University, St. Francis and Alton Road.

Q. What is the difference between being on the staff and being on the Visiting staff?

A. Being on the Visiting staff is permissibility to bring patients into that institution for treatment and operative work, while being on the actual staff is to actually give your time over to charity work brought into the institution.

Q. Then you can be called upon?

A. Yes. I serve three months each year.

Q. Now prior to March, 1936, did you know Mr. Henry Yeiser?

A. I did.

Q. In what capacity?

A. As his personal physician.

Q. And in connection with what trouble were you his personal physician?

A. May I ask, sir, the meaning of your question?

Q. I want to know what ailment, if any, you were treating him?

A. I was treating him for chronic alcoholism.

Q. And when did you begin the treatment of Mr. Yeiser for that?

A. I would have to look at my dates on that. Approximately two months, sir.

Q. Two months before March?

A. Approximately, yes.

Q. At that time where was the treatment taking place?

A. Aboard his yacht.

Q. And when you began the treatment of Mr.  
280 Yeiser what was his consumption of alcohol?

A. At that time I went on the case he was consuming one gallon of gin per day.

Q. And as your treatment progressed did you succeed in lessening his consumption of alcohol?

A. I did.

Q. By what methods?

A. By progressively reducing the amount of alcohol in each drink. At the time or just previous to this trip in question I had reduced his daily consumption to less than four ounces of alcohol.

Q. And when you say four ounces of alcohol does that mean four drinks per day?

A. Four ounces, sir, actually measured gin.

Q. Was gin the drink that he drank?

A. Gin was the only drink that he was consuming.

Q. How was his general condition just before this trip with which we are concerned as a result of your treatment?

A. Well, I was very happy in the progress that I had made on the case, or the apparent progress, we will say, because Mr. Yeiser complimented me very highly.

Q. Instead of referring to his condition as it affected you, tell us how he progressed.

A. That is what I want to explain.

Q. I am not sure that they will allow you to do that, doctor.

A. His progress was very good. He came into the city for the first time in six months.

Q. How long before this trip?

281 A. Just a day or so.

Q. Spent the day ashore?

A. Yes, he spent the day ashore.

Q. Now when did you learn that he was contemplating this trip?

A. Oh, it was spoken of for two or three days prior to their going; it was mentioned, however; Mr. Yeiser himself did not mention it to me until the night before they were to take off.

Q. When you heard that this trip was contemplated did you have a conversation with Mr. McKay?

A. I did.

Q. What did you say to him and what did he say to you?

A. I asked Mr. McKay not to go on the trip or to not take Mr. Yeiser out, that I felt it would be most detrimental to him and that if he got back on the amount of gin that he had been on it would probably mean his death.

Q. Did Mr. McKay say anything to you when he told you that?

A. I forget his answer other than to say or intimate that he would take care of it, and that's about all.

Q. Well, now did you receive any word from the yacht Friendship II on the morning of March 2, 1936?

A. Yes, sir.

Q. And as a result of that where did you go?

A. I went to the yacht which was anchored in the Royal Palm Yacht Basin, sir.

Q. When you got there who did you see and what did you do?

A. I went aboard the yacht from the right-hand side of the boat, or the left side looking forward. The first person to meet me at the gangplank was one of the seamen, and Mr. McKay spoke to me just as I had gotten on board the deck, so we had a couple—

Q. Can you tell us approximately the time when you got there?

A. It was probably somewhere around 8:30 or 9:00 o'clock; probably eight to nine o'clock, somewhere in there;

I don't remember the time, but approximately that is right; it was the first call I had made that morning, and I had been up quite late the night before.

Q. When you received word where were you?

A. I was at my home, and I hurried to the boat because the call said to hurry there, which I did.

Q. And you saw Mr. McKay?

A. Mr. McKay said that we have a couple of carbon monoxide poisoning cases here, and on the aft deck to one side was Henry C. Yeiser standing there shaking.

Q. What do you mean by "shaking"?

A. Well, he was jittery all over, very jumpy and nervous.

Q. Had you ever seen that condition in Mr. Yeiser before?

A. I had at the beginning of my treatment of him, sir.

Q. And what in your opinion was that condition caused by?

A. May I correct my remark there to say I had not seen him manifesting shaking as much before as he was that morning. He of course said, "we have got a couple of monoxide poisoning cases here, doctor," and that's  
283 that. Of course these seamen were around and

I paid little or no attention to them. Lying on a raised portion of the aft deck, which was well upholstered, heavy cushions and the like, was Mrs. Just, Mrs. Charlotte Just, who was apparently well cared for, covered with a blanket and so on.

Q. Did you go over to her?

A. I went to her and very hurriedly checked her pulse, which was all right. As to the other patient, I dashed into Mr. Yeiser's bunk or private room, and she was on his bed. I checked her hurriedly enough to see that there was no immediate danger, and I went back to the other one, and the first thing I did was to fix up a dose of caffeine sodium benzoate.

Q. What was the dosage?

A. Seven and one-half grains. It is put up in the usual form, sir.

Q. All right.

A. That was given to her. When I attempted to give it to her she pulled her arm back and objected to it being given, and when I did stick her she muttered something, but I paid little or no attention to it.

Mr. Mershon:

, May I ask that the witness identify to whom he is referring as "her".

The Witness:

Mrs. Just, sir.

(By Mr. Parmer):

Q. You may proceed.

A. Generally in giving the hypodermic we also use alcohol to stimulate the skin. I wet up her arm a bit, and it was a brisk March morning, and she pulled the covers back, pulled them up over her—

284 Q. You mean to say that she pulled up the covers herself?

A. She pulled up the covers in an endeavor apparently to get out of the briskness of the air. I went directly from her and gave the other patient, Miss Grunow, an exact dose. Miss Grunow was given a like dose. She submitted to it being given hypodermically, although she remarked about it also. Her remarks were more audible from the beginning than were Mrs. Just's.

Mr. Mershon:

We object to the remarks unless the witness says what she said. He says they were audible, but we want to know whether they were intelligible.



The Witness:

Mr. Mershon, in treating cases like that the main idea, Your Honor, is that we, as physicians, never pay any attention to these little remarks that they make, unless we feel that we are dealing with an insanity case, trying to diagnose a case of that kind, we pay very little attention to such remarks. It wasn't a matter of what she said that meant anything to me.

(By Mr. Parmer):

Q. But she did say something?

A. Yes, sir.

Q. And the difference between Miss Grunow and Mrs. Just was that whatever Mrs. Just mumbled probably didn't mean anything to you, that is, you could not understand it, whereas what Miss Grunow said was intelligible?

A. Yes, sir.

Q. All right.

A. The pilot on the boat had proceeded and secured the nurse who had formerly taken care of Mr. Yeiser, and the nurse was aboard the boat; she was helping  
285 me around with each patient, tidying them up and making them as comfortable as possible and following out instructions as I gave them.

Q. Who was that nurse?

A. She was then a Miss Florence Norwood.

Q. Is she living now?

A. No.

Q. How long ago did she die?

A. I think it was in the early spring of this year that she was burned to death.

Q. Well, did you observe anything with regard to the appearance of either Mrs. Just or Miss Grunow, that is, the appearance of their faces?

A. Yes.

Q. What color was it?

A. There was a moderate cyanosis present around the mouth of both of them. When I speak of cyanosis I mean a blue discoloration of the mucous membrane of the skin.

Q. What was the color, if it was noticeable, with regard to the rest of the face or the rest of the body?

A. I didn't go over the rest of the body, sir.

Q. But the face?

A. Well nothing other than normal, probably a little pale, but the main thing was a little cyanosis around the lips.

Q. Did you notice any redness?

A. No, I didn't.

Q. How long did you remain upon the vessel  
286 at that time administering to the two ladies?

A. Mr. Parmer, I was on that boat there probably an hour and a half or two hours. I was off to answer an emergency call, and I was back and forth on the boat I don't know how many times during the interval between the time I first went there and until late into that night when the last one was removed.

Q. During the time that you were first there, that is, during the interim between your first coming and your first going, did you watch the progress, if there was progress, of Mrs. Just and Miss Grunow?

A. I did.

Q. And what did you observe?

A. Miss Grunow talked right along in pretty short order.

Mr. Mayne:

I submit that that is rather indefinite.

Mr. Parmer:

We will find out.

(By Mr. Parmer):

Q. You see the objection to your statement is that it is not definite enough. Now if you can define it better it will help us all. What did you notice with regard to her talking and when; how long after you saw her did you notice it?

A. To say a definite time would make me a liar; I do not know the definite time, whether it was fifteen or thirty minutes or sixty minutes, except that in short order, sir, meaning probably within two hours' time, she was talking; she talked to the nurse. We medical men, gentlemen, if you please—

Mr. Mehrrens:

Were you present at the time she talked to the nurse?

-287 The Witness:

Yes. I was in and out of the bunk room, or his private room, I will say instead of bunk room, every few minutes.

Mr. Mershon:

She was talking to the nurse in your presence?

The Witness:

Yes, she would speak to the nurse off and on.

(By Mr. Parmer):

Q. All right.

A. We depend, as medical men, upon the nurses as our guide a lot as to how our patients are doing, because we cannot stand over them constantly and look at them, especially when they are not acutely ill.

Q. You heard Miss Grunow talking in about an hour?

A. Yes.

Q. Now how about Mrs. Just?

A. Mrs. Just didn't talk to me at all; she seemed to assume a pugilistic type of attitude, fighting back, and didn't want to be disturbed, and the like.

Q. Now you have given your reactions to them. What we want to know is what she did to cause these reactions in your mind.

A. Well, the movements of her arms, sir, when someone would try to do something for her, the movement of her head away from the oxygen container, CO<sub>2</sub> and oxygen which was administered to her.

Q. How long after you came there was this CO<sub>2</sub> and oxygen administered to her?

A. That was ordered immediately, sir.

Q. How soon did it get there?

A. It was aboard the boat in thirty minutes' time.

Q. Did you administer that to Mrs. Just?

288 A. I gave that first, sir, and the nurses gave it.

Q. After that?

A. Yes.

Q. When you gave it did you notice anything that Mrs. Just did?

A. Yes, sir.

Q. And what was it?

A. She would move her head out of the way; when we held the funnel up to her nose she would move her head away from it; if anything touched her face she would get her head away and you would have to steady her head to make her breathe it.

Q. Did you notice whether her eyes were open at some times?

A. I didn't pay particular attention to that, sir.

Q. Well now I think you said you went away and then came back?

A. Yes, sir.

Q. But do you remember the particular time at which you came back after being away?

A. No, as I said, sir, I was on and off the boat; I would come back to the boat at every moment I could; I had other work to do and look after. These women were certainly not what I considered dangerously ill.

Q. Well now tell me during the rest of the morning on occasions when you returned, did you notice any progress in their condition?

A. Yes, sir.

Q. What did you observe?

289 A. Miss Grunow apparently was doing beautifully it seemed; she talked and turned about at random on the bunk; she was permitted to sleep, in fact, she was encouraged to take rests. The other woman turned on her side, one side to the other. As I stated before, she assumed a pugilistic type of an attitude and didn't want anybody to do anything for her. She was doing all right according to the check-up. She was nauseated during the morning hours.

Q. She was nauseated?

A. Yes.

Q. What was done for her in regard to that?

A. She was left alone to vomit, clean her stomach out.

Q. What did she vomit?

A. The food contents of her stomach.

Q. That is what she vomited?

A. Yes.

Q. Into what did she do the vomiting?

A. Containers they had aboard, or basins and things of that kind.

Q. When that took place who was holding the container?

A. The nurse was, sir.

Q. I want to know whether you were present when the vomiting took place?

A. I was present there when some of it took place, sir.

Q. The nurse would hold the container?



A. Yes.

Q. And what did Mrs. Just do?

290 A. Well, she would vomit; that's all I can say, sir.

Q. What I want to know is if it is true or not that she directed the course of the vomiting in the basin, or was she required by the physician or someone else to do it?

Mr. Mayne:

We object to leading the witness. You are just trying to put the words in his mouth.

The Court:

The objection is overruled.

A. She did not vomit on herself; she did not soil her bedclothes; she directed the vomitus away from her, and she didn't have to be told to do it either.

Mr. Mershon:

We move to strike that last answer on the ground that the physician said he was not present there except on one or two occasions when she vomited.

The Court:

I think it is a matter for cross examination. You may proceed.

Q. Doctor, did you return to the vessel at any time in the afternoon?

A. Yes, sir.

Q. Do you know at about what time you returned?

A. I was there shortly afternoon.

Q. Now when you returned on that occasion did you remain on the vessel until Mrs. Just was taken to the hospital?

A. Mr. Parmer, I was there, as I told you a while ago, off and on so many times during the day; I don't know how many times I was off and on the boat, and as to the particular time in the afternoon I was there,—I was there shortly after the noon hour, and I did take the  
 291 young lady to the hospital personally about two o'clock, somewhere in the neighborhood of two o'clock.

Q. Well now at that time when you took Mrs. Just to the hospital what did you do with regard to Miss Grunow?

A. I left her alone there on the boat.

Q. Before taking Mrs. Just to the hospital did you have a conversation with Mr. McKay?

A. I did, sir.

Q. And at what time did that conversation take place?

A. I couldn't state that time, sir.

Q. Was it in the morning or afternoon?

A. In the afternoon.

Q. Approximately how close to the time when you took Mrs. Just to the hospital?

A. Well, certainly within the hour, sir.

Q. Now in the course of that conversation will you tell us what was said to him and what he said to you?

A. I wanted to take the young lady to the Jackson Memorial Hospital because the Jackson Memorial is one of the best equipped and most outstanding hospitals.

Mr. Mayne:

We object to that; he was asked what was said between the two parties, and not his observations of one hospital.

The Court:

Just a minute, Mr. Parmer; if you will let the Court rule on the objection of Mr. Mayne we will get along better.

Mr. Parmer:

Thank you, Your Honor.

292 The Court:

The voluntary statement as to the character of the hospital is not responsive to the question. If you will respond to the question and answer it directly, Doctor, you will be better off.

Mr. Parmer:

Please restate the question to the witness, Mr. Reporter.

(Thereupon the preceding question was read by the Reporter as above recorded.)

A. I wanted to take her to the Jackson Memorial Hospital and I talked with Mr. McKay regarding it, and he said, "no, we don't want to take her to Jackson; it is a city hospital and the newspapers would snoop around there and get this story in the papers and they will make a nasty story out of it. I don't want to take her there. What about the St. Francis." I said that it was a long way away, at the Beach, and very inconvenient, and I said; "but if you wish, we will take her wherever you say. I don't care."

Q. Well how close was the Jackson Memorial hospital to the place where the boat was?

A. Oh, the boat was right over here at the Royal Palm dock, sir, and it was probably a maximum of six to eight blocks away-Southeast. Jackson Memorial is at 1700 block of Tenth Avenue, Northwest.

Q. What is the distance?

A. Roughly a mile and a half.

Q. Is it a fully equipped hospital?

293 A. Yes, it is; Jackson Memorial is conceded to be the best equipped hospital south of Atlanta, one of the best equipped hospitals in the south.

Q. And that is where you are on the staff, I believe you said?

A. Yes, sir.

Q. Well now as a result of seeing these girls on board the vessel prior to the time that Mrs. Just left for the hospital, did you form any opinion with regard to what was the cause of their condition?

A. Yes, sir.

Q. What opinion did you form?

Mr. Mershon:

We object to that question because it has not been definitely stated what is the basis of this opinion he is now asked to express. If counsel wishes to limit his opinion to just what he has described and nothing else, it may be admissible.

Mr. Parmer:

I think it is limited.

Mr. Mehrtens:

The question is too general; it does not give definitely enough the basis of the opinion that the witness is asked to express.

The Court:

I think that is a matter of cross examination. I think that from what has been brought out there is sufficient for this witness to express an opinion.

Mr. Mershon:

I do not mean to be persistent here, if the Court please, but I wish to call attention to the fact that the question does not say: "As a result of what you saw there, as you have previously related"—

294 Mr. Parmer:

Yes, I will accept that suggestion. May I re-frame my question, Your Honor?

The Court:

You may.

(By Mr. Parmer):

Q. Doctor Howell, as a result of what you saw while you were on the vessel during the course of your examination and observation of the two women, as you have previously related it, did you form any opinion as to what was the cause of their condition?

A. I did.

Q. And what opinion did you form?

A. I felt that they were suffering from carbon monoxide poisoning.

Q. As you had been told?

A. Yes.

Q. Did you form any other opinion, medical opinion, as to what they were suffering from?

A. I did.

Q. What opinion did you form?

A. Well, I thought that there was a great probability of alcoholism.

Mr. Mayne:

A great probability?

The Witness:

A great probability of alcoholism, sir.

(By Mr. Parmer):

Q. Now you say that you went to the hospital with Mrs. Just?

A. Yes, sir.



Q. And when you arrived there did you proceed to prescribe for her?

A. I did.

295 Q. Doctor Howell, I show you this part of the hospital record which has been marked in evidence as Claimant's exhibit No. 9-A, and call your attention to the sheet entitled "Treatment Record-Physician's Orders," and particularly the note bearing date of March 2, 1936, with your name at the bottom, and ask you if that is a copy of the order made by you on March 2nd, which was first entered in the order book?

A. Yes, sir.

Q. Now will you tell us what orders you gave for the treatment of Mrs. Just?

A. The first order was high SS enema.

Mr. Mershon:

We object to the witness reading from his record unless he is asked to do so. The question apparently called for the witness' own recollection.

The Court:

Unless it is made to appear that he is looking at it for the purpose of refreshing his recollection.

Mr. Mershon:

That is all right.

A. I cannot give it in the order that I put it down on the order book, but I can tell you what I ordered.

Q. All right.

A. First I ordered, as I stated, a high SS enema, which is a soapsuds enema, to clean the lower bowel out; I ordered sodium phosphate fleets, an ounce of them. Following my high SS enema I asked for a black coffee retention enema. I also use caffeine sodium benzoate—we will say PRN—when necessary as a supportive measure,

and I ordered, I think, an ice-cap to her stomach to allay the nausea and vomiting. I think that covers it, sir, although I am not sure.

Q. Will you tell us wherein the different  
296 medicants that you have mentioned there are supposed to be efficacious in alleviating the particular thing you were trying to cure?

A. The medicants ordered are almost standard treatment for alcoholism.

Q. Will you tell us what each one does; what it is designed to do in treating alcoholism?

A. The soapsuds enema was purely to clean out the lower bowel, and the black coffee enema is a retention enema, which is a stimulant, and the caffeine absorbed from that stimulates the brain centers, as well as stimulates the flow of urine.

Q. Is there any similarity between such a caffeine enema and the cups of black coffee that people will drink after being out on a night of heavy drinking?

A. They are the same thing, sir. When it cannot be taken by the mouth on account of the vomiting and nausea, it can be given through the rectum, and it is absorbed the same way. Caffeine sodium benzoate is a stimulant; it also stimulates urination and it stimulates the psychiatric centers of the brain.

Q. What is the reason for stimulating urination in alcoholism?

A. Elimination, sir.

Q. Proceed with the other things that you gave.

A. I put an ice-cap to her stomach in an endeavor to settle her stomach; she upchucking, or vomiting, quite a bit, and had been vomiting from the boat to the hospital.

Q. Now this sodium hydrophosphate,—do I have the name right?

A. No, sir.

297 Q. Sodium phosphate, then?

A. Sodium phosphate.

Q. All right.

A. Sodium phosphate is bordering between powdered magnesium sulphate, which is Epsom Salts, and which is used for the purge of the bowels; it has a very high cathartic effect and it draws the water into the bowels and increases the elimination.

Q. Is it in any way preferable to Epsom Salts?

A. I prefer it, because it is a bit more potent, sir.

Q. Is the dosage that you give there the dosage designed for an ordinary cathartic, or was it designed for a particular case of alcoholism?

A. No; the dose that I gave was about twice the normal dosage for a normal individual; it was designed to give a marked elimination.

Q. Let me show you the hospital records. Now, Doctor Howell, I call your attention to this note here which I believe is in your handwriting, on Page 1 of Claimant's Exhibit 9-A, that is, on the first page. I think that says "C. C."; that is "chief complaint"?

A. Yes.

Q. And after that it says "Apparent CO2 poisoning"?

A. That is right.

Q. That was written by you?

A. Yes, sir.

Q. Are these notes also written by you?

A. Yes.

298 Q. I will read them.

A. All right.

Q. What does "P. I." mean?

A. Present illness.

Q. "Called to boat 8 A. M. to see patient in semi (line drawn through the semi) unconscious condition-moderate cyanosis-increased inspiration"—

A. Respiration.

Q. "Rapid pulse and a history of apparently being overcome by fumes from the boat's engines. Given

C O 2 5% & Oxygen 95%— and caffeine-thence to hosp.”  
And all of that was written by you?

A. Yes.

Q. Now I call your attention to what appears on the second page of Exhibit 9-A at the top under the printed words “Working diagnosis: After physical examination”, —there appears “CO2 poisoning”.

A. Yes.

Q. Was that entry made by you?

A. Yes, sir.

Q. I call your attention to this note under “Physical findings”, at the bottom thereof, where it says: “Imp”. What does that mean?

A. Impression.

Q. And after that “CO2 poisoning”?

A. Yes.

Q. That was put there by you?

299

A. Yes, sir.

Q. Well, now, doctor, will you explain how it came about that you put down on the hospital records that this Mrs. Just was suffering from carbon dioxide poisoning if your opinion actually was that she was suffering from alcoholism and was not suffering from carbon monoxide poisoning?

A. Yes, I can explain that. Aboard the boat, sir, I was given to understand that they didn't want any publicity. Mr. McKay made it very plain that they didn't want any nasty story about the thing, didn't want the newspapers to get hold of it. I had a case there that I believed to have been alcoholism, and in an institution or religious institution such as the St. Francis hospital, to write a diagnosis—

Mr. Mayne:

I object to that; I don't think it is proper, and it is certainly a conclusion of the witness.

Mr. Parmer:

It is necessary to explain the apparent contradiction.

Mr. Mershon:

It has not been shown that that was ever conveyed to those claimants or to anyone representing them, and it is objected to on the further ground that it is a self-serving declaration. If the witness is undertaking to testify to a rule of the hospital, there is a proper way to prove that, basing his opinion upon the rules of the hospital. The rules should be first admitted in evidence and then the witness may refer to them.

Mr. Parmer:

There has been no attempt to testify to a rule of the hospital.

300 The Court:

That is exactly what he was doing. He was explaining the rule of the hospital, of a religious institution, as to why he did so and so in view of that rule. The objection is sustained to that portion of it.

A. Your Honor, I can explain it in a different way. I do not have to put in the rules of the hospital whatsoever other than to say that I didn't write it alcoholism more as a protective measure for the girls, their good names,—

Mr. Mayne:

I object to that, Your Honor; it is a voluntary statement. It has not been shown that the girls requested him to do this, and certainly any request by Mr. McKay would not be binding on these claimants.



Mr. Mershon:

And the additional ground, if Your Honor please, that he has not even testified that Mr. McKay asked him to use any protective measures in writing up the diagnoses on the hospital records.

The Witness:

May I explain, Your Honor?

The Court:

No; just a minute. I do not regard this as an impeachment of one's own witness. I don't think it falls within that category; neither do I think it is necessary to render his explanation of why he made a record at the hospital inconsistent with what he stated was his opinion. I shall allow him to proceed with his explanation of why he made the records, but without reference to what was stated by anyone else requesting that that be done. He can make a statement of why he did what he did. You may proceed along that line.

301 The Witness:

From the record, gentlemen, it is apparent that I had in mind alcoholism, because I treated them for that. I wrote there "CO2 poisoning", which is not carbon monoxide, because there was no use of hurting the girls. That was all there was to it. I felt that the record would go to the record-room and that would be the end of it and that nobody else would ever be the wiser. If I may make a statement—

The Court:

Do you want to make a statement, if so, you may.

The Witness:

I will say in explanation, gentlemen, that I have a very dear old lady here who is the victim of syphilis. This

lady is under my care, and I am treating her for syphilis at the present time—

Mr. Mayne:

I don't see where that is material. It merely clutters up the record.

The Court:

I think so. That is objectionable. You may proceed.

(By Mr. Parmer):

Q. Tell me, Dr. Howell, is it an unusual matter to state as a matter of record a different diagnosis than the actual one?

Mr. Mehrtens:

If he is attempting to testify as to what is the usual practice in the medical profession in Miami I object to it, because it has not been shown that he is qualified to testify to that. If he is testifying as to his own practice I will withdraw the objection.

Mr. Parmer:

I will confine it to that.

A. Circumstances alter situations, sir.

Q. Do you mean by that that under certain circumstances you have followed that practice of stating a different diagnosis than the actual one?

A. Yes, sir.

302 (By Mr. Parmer):

Q. Well, Dr. Howell, did you call any one in to assist you in this case?

A. Yes, sir.

Q. Who did you call in to assist you?

A. Dr. Bob Harris of this city.

Q. How soon did you call him in?

A. I called Dr. Harris in only in a consultant capacity the night of her admission to the hospital, only at the request of Mr. McKay, because he felt that the family would feel better, that two heads or two ideas would be better than one.

Q. Is he a leading physician in this city?

A. Yes, he is one of our very best.

Q. Did you call in Dr. Foxworthy?

A. I didn't.

Q. On the day that Mrs. Just was brought to the hospital did you receive any communication from him?

A. I did not.

Q. When did you first learn that Dr. Foxworthy was treating Mrs. Just?

A. That night upon my return to the hospital—upon my return to the hospital on my evening rounds.

Q. How did you find it out?

A. I found an oxygen tent on my patient and I asked for advice.

Q. You asked what?

A. I asked why it was there.

Q. And you found some one else had ordered  
303 it?

A. I found that he had come on the case without calling me or anything of the kind.

Q. You found what?

A. I found that he came on the case without calling me or saying anything to me about it, sir. He ordered the oxygen tent and what else I don't know, because the man didn't write any orders down; he issued his orders verbally to the nurse, and that was that.

Q. Well now did you do anything about that situation when you found it out?

A. Yes, sir. I discussed it with my elders, sir, senior men in the profession, and among them Dr. Harris.

Q. Don't tell us what the conversation was.

A. All right.

Q. But as a result of your conversation with your elders did you do anything?

A. I let him alone there for a day or so.

Q. You mean you let Dr. Foxworthy alone?

A. Yes, sir.

Q. Well now did you have any communication with Dr. Foxworthy; did Dr. Foxworthy speak to you or did you speak to him?

A. About two or three days later he called me up,—his wife called me and asked me to come by his house, stating that the doctor was a semi-invalid and he wanted to talk to me regarding this case, and asked me if I would extend him the courtesy of stopping at his home en route to the hospital, and I did.

Q. How long did you remain there?

304 A. We talked probably for fifteen or twenty minutes.

Q. What did you talk about while you were there?

A. He discussed his relationship with the family; he introduced himself because I had never seen the man before that time, and probably at that time he mentioned the case, but as to going into the details he did not, sir.

Q. Did you express the opinion to him at that time that Mrs. Just was suffering—

Mr. Mershon:—

We object to that question that he is about to frame, as being leading. He should ask the question: What opinion, if any, did you express to him?

The Court:

What is that?

Mr. Mershon:

Counsel is about to ask the witness for the expression of an opinion and then stating the opinion to the witness and calling for a yes or no answer.

Mr. Parmer:

I have a reason for that, because Dr. Foxworthy testified yesterday that Dr. Howell met him on the porch and expressed a certain opinion.

Mr. Mershon:

All right; I will withdraw that objection.

(By Mr. Parmer):

Q. Did you while you were at Dr. Foxworthy's house on that occasion express an opinion to him that Mrs. Just was suffering from the after-effects of carbon monoxide poisoning?

A. No, sir; neither did I express the opinion, sir, that she was suffering from alcoholism. The man's daughter was apparently, from what he said, one of her closest friends, a childhood friend or chum, and I saw no reason to knock her to him.

Q. Now did you receive any visits from Dr.  
305 Foxworthy in the hospital at any time after that?

A. Yes, I did.

Q. And where did that visit take place?

A. Well, Your Honor, may I explain the circumstances of the visit?

Q. That will come; tell us where it took place.

A. It was in the library of the hospital.

Q. Prior to receiving that visit had you made any objection to Dr. Foxworthy and his actions with respect to your orders in the case?

A. I had.

Q. What had you found out that he done with regard to your orders?

A. Countermanded my orders as they went in; not on one occasion, sir, but on numerous occasions he countermanded my orders and told the nurses that they should not carry out this or that. Finally I went to Sister Josephine and just told her in quite few words



that I absolutely refused to work with the man any longer on the case, that either he had to go or I would go. I also went to Mrs. Just's aunt.

Q. Where did you see her?

A. In the room.

Q. In what room?

A. The patient's room.

Q. The patient was there at the time?

A. The patient was there in bed and the  
306 aunt was in the room.

Q. Did you have any conversation with the aunt?

A. Yes. I told her at that time that I would not be bothered on the case with this man any longer, that it was a question of whether she wanted me to treat her or Dr. Foxworthy. I said, "You can make your own choice."

Mr. Mayne:

Fix the time right at that point.

(By Mr. Parmer):

Q. Mr. Mayne, would you like to tell him the date and place this happened?

A. My dear sir, I cannot fix absolutely the date, but it was probably the day following, a day or so following the instance on the porch. Now may I explain further, if you please?

Q. Yes.

A. I talked with this Mrs.—I don't know the lady's name—but it was her aunt anyway.

The Court:

Bischoff.

The Witness:

Bischoff. I talked with her and she expressed the desire that if possible I try to be more tolerant of the

man and permit him to remain there. It seemed that he was a friend of the family of somewhere else, and that she herself would have to go into a routine explanation of something to the family, and I told her that I had just tolerated him as much as I could, and that was that, and she said, "In that case, doctor, I will notify Dr. Foxworthy myself that he is not to see the patient again." I said, "Very well." I had the same agreement with the hospital, or at least with Sister Josephine. Following that little talk to the hospital and to the aunt, the next morning at about seven o'clock his wife called me.

Q. Whose wife?

307 A. Dr. Foxworthy's, and she was exceedingly nasty; she said that I was a cad and everything else she could think of, that I had taken advantage of an elderly man, and I explained to her as best I could, but she would not listen to any explanation. She asked me if I would extend the courtesy of talking with him that morning, and I said I would be very happy to talk with him if he had anything to say to me. She asked me then where and so on and I told her I would be at the hospital, that I would probably be there around ten o'clock. I was there at approximately 10:30, running a bit late, and she bawled me out before I got out of my car.

Q. Who did?

A. His wife.

Q. Was Dr. Foxworthy there?

A. No.

Mr. Mershon:

That is objected to.

The Court:

Strike that in regard to what Mrs. Foxworthy said.

The Witness:

In other words, I proceeded on into the hospital and I talked with Dr. Foxworthy in the library of the hospital. We didn't even sit down. He came in and apologized first for his forcibly injecting himself into the case, and went on to explain again that he was a friend of the family and so on and so forth. I explained to him my reaction to his actions in cancelling my orders and that I had done everything in the world I would

for the patient, and that I didn't feel it was  
308 right; whereupon he said, "Doctor, there is no use of us bickering over this case; it is big enough for both of us; it is a case in which I am going to advise these young ladies to sue." He said, "It will be a nice fee for both of us." I said, "Doctor, do you realize that I am the personal physician of Henry Yeiser"; he said, "Yes, but that does not make any difference; these girls have good grounds for a good suit", and that's that. I said, "I won't be a party to anything of that kind." We parted and he wasn't to go back on the case. I carried on there probably for twenty-four hours afterwards and the girl was doing beautifully and I discharged her from the hospital.

Mr. Mayne:

Who discharged her?

The Witness:

I discharged her, sir, but in a short time afterwards I learned that he was seeing the patient in spite of my objection.

Mr. Mayne:

I object to that, Your Honor.

Mr. Parmer:

You can't tell what you learned.

The Court:

That is stricken. Just to follow that up, to where was Mrs. Just removed from the hospital?

The Witness:

Your Honor, she was removed about that time to her home or residence of her aunt, as best I know.

The Court:

Did you visit her to the removed place?

The Witness:

I went to visit her where I was told that she was, but she wasn't there, sir.

The Court:

Did you ever attend her medically or professionally after that?

The Witness:

I did not, sir.

309 The Court:

Did you have any conversation with Dr. Foxworthy thereafter in regards to her professional treatment by either you or him?

The Witness:

Your Honor, I haven't seen Dr. Foxworthy until last night since the happening in the hospital.

Mr. Mershon:

I would like to ask counsel to inquire of the witness if she left the hospital at the time he says he discharged her.

Mr. Parmer:

I am getting into that now.

The Court:

We will take a fifteen-minute recess.

(Recess.)

(By Mr. Parmer):

Q. Doctor, I want to inquire about the time when you discharged Mrs. Just from the hospital. Can you tell us approximately when it was, or would you need a record in order to tell?

A. No, sir. I discharged her the day before the young lady left the hospital.

Q. Did you find out that she was there after you had discharged her?

A. Yes.

Q. Did you ascertain how she happened to be there after you did discharge her?

A. Because my order just wasn't carried out, sir; Dr. Foxworthy apparently intervened and felt like keeping her there.

Q. Now you were asked with regard to whether you saw Mrs. Just after she left the hospital and I think you said you didn't.

A. That is right.

Q. Did you go to her place of abode?

310 A. I went to where I was told she would be.

Q. Where did you go?

A. To the home, the so-called home of her aunt on the Beach; it was in some Villa way up on the ocean front; I can go to it, but I can't give you the address of it. It is in a group of houses that are built in an arch called some Villa; I don't know what the name of it is.

Mr. Mershon:

Archway Villás?



The Witness:

I wouldn't know if you told me, Mr. Mershon. I could go to it; I could go to the house as far as that is concerned.

(By Mr. Parmer):

Q. When you arrived there whom did you see?

A. When I arrived there I was asked to sit down on the ocean front there a few minutes. I sat there and waited for Mrs. Bischoff. Mrs. Bischoff was talking over long distance telephone to somebody somewhere, and I was told that I would be ushered in as soon as that was over. I waited around and was asked in in a bit and talked with Mrs. Bischoff.

Q. You talked to her?

A. Yes.

Q. Did you see anybody else there?

A. No, I didn't.

Q. Did you see anybody else while you were there besides Mrs. Bischoff?

A. I didn't.

Q. Did you ever see Miss Grunow at any time after Mrs. Just left the hospital?

A. I saw neither one of them.

311 Q. You didn't see Miss Gruner again?

A. No, I didn't see either Mrs. Just or Miss Grunow.

Q. Now did you ask to see Mrs. Just when you saw Mrs. Bischoff?

A. I told her, when I made my entree, that I thought I would drop in to see how the young ladies were getting along, and I was told that Mrs. Just was out, but that Miss Grunow was there; however, she returned earlier in the evening from a cocktail party and had retired.

Q. Did you see her?

A. No, sir; she was retired.

Q. She was retired?

A. Yes.

Q. And you didn't see Mrs. Just at all?

A. No, sir.

Mr. Mayne:

Fix the time at that point.

(By Mr. Parmer):

Q. Please tell us how long after Mrs. Just left the hospital it was that you went to this Villa.

A. Well, Mr. Parmer, probably three or four days; I don't know just exactly the date.

Q. What time of the day?

A. In the evening, sir; probably around nine or nine-thirty; somewhere along in there.

Q. Coming back to the time that you were on the boat. When you arrived there in the morning the first time did you have an opportunity to observe Mr. Yeiser's actions while you were there?

A. Yes, I did.

312 Q. What did you observe with regard to his actions in addition to that which you have told us about?

A. It was very evident that Mr. Yeiser was drinking very heavily, sir.

Q. And what was evident about that?

A. His general condition, the fact that he was in the condition that he was in. I knew him. That's all.

Q. Well now did Mr. Yeiser ever have any difficulty about walking?

A. Yes, he had.

Q. What caused that?

A. Alcoholic neuritis.

Q. What was the effects of it; how would it appear to someone else who looked at him?

A. Very unsteady on his legs; however, he overcome it to a great extent.

Q. You mean as a result of your treatment?

A. I mean up to that time.

Q. On the return from the trip did you see any evidence of that?

A. Yes.

Q. Will you tell us or show us how he walked?

A. His legs lost their muscular coordination; it is a tremble affair; it is not only that but it is quite painful and achy type of a thing, and it also gives you an unsteady gait.

Q. During the time that Mrs. Just was in the  
313 hospital and observed by you, will you tell us what you observed with regard to her progress; and if you need the records to refresh your recollection you may have them.

A. Her progress was exceeding happy, sir, and, as I said, there was no apprehension as to her well-being at the time I put her in the hospital; however, I felt that the situation needed hospitalization, that she certainly could not be left aboard the boat, and I didn't feel that it would be best for my patient. During that evening she was talking and so on and so forth, and was co-operative. The following day she was very co-operative and very talkative. She talked along to me; however, there seemed to be—she expressed a fear the following day—it seemed that she was worried that her child might be taken from her by her husband.

Q. Did she say why she feared that?

A. The only thing—the thing I concluded was—

Q. I don't want your conclusion.

A. All right, sir; excuse me.

Q. I want to know if she conveyed in words to you the reason for her fear; don't state your own conclusions. In other words, did she say anything which conveyed the impression to you as to why she did it?

A. There was this fear that existed.

Q. I don't want your conclusions; I want to know what she said.

A. All right.

Q. I note that on the 3rd of March you made the following note—is this your note?

A. Yes, sir.

Q. Of March, 3rd?

314 A. Yes.

Mr. Mershon:

We will ask counsel to refer to the instrument.

Q. It is on Claimants' Exhibit 9-A, on the third page thereof. It is the note dated March 3, 1936, at 2:00 P. M.: "Patient seen—waked out of sound sleep—color good after removal from oxygen tent—patient's mentality, apparently quite clear—mind active and alert; however, there is a definite aphasia present." What is the next?

A. "She is quite talkative and pleasant. Does not recall happenings of yesterday. Pulse 86-B. P. 110/70. Progress very good."

Q. And that was signed by you?

A. Yes.

Q. Now was that a normal blood pressure, 110/70?

A. Yes, sir.

Q. Was that a normal pulse, 86?

A. Yes, sir.

Q. Well now will you tell us what you mean when you use the word "aphasia"?

A. I meant by that, gentlemen, that she was evasive. I realize that the use of the word "aphasia" is incorrect there, because aphasia really means inability to speak words, but refers down to the latter explanation of it below there where I said that she was unable to remember happenings of yesterday, and so on and so forth.

Q. In other words, what you say—

315 A. She did not want to recall those, you see.

Q. In other words, you have here, "she is quite talkative".

A. Yes.

Q. So in using the word "aphasia" you say you did not mean it in a technical sense?

A. No, sir.

Q. Now let's refer to the March 4th entry on the same page. Will you read that?

A. "3-4-36—patient feels very good—talks freely; however, is apparently mentally cloudy yet."

Q. With respect to what subject, if any, or subjects, was she mentally cloudy?

A. I referred back to my quizzings of the happenings of what happened to her.

Q. Now I call your attention to the note on the fourth page of the same exhibit which appears to be dated March 5, 1936, and I will ask you if you made that note?

A. Yes.

Q. Will you tell us what it says?

A. "3-5-36. Patient sleeping upon my visit—apparently progressing nicely. I feel that all sedatives should be discontinued and give the mental condition a chance to clear. Sedatives should be used only if nerve condition necessitates same."

Q. I want to ask you, sir, had you been prescribing sedatives yourself?

316 A. I may have in the very beginning, but I don't remember, sir, but I had cut them all out because I felt that they should be cut out.

Q. Well now I want you to look at the record and see if you gave orders in the beginning—see if you can find any orders in the beginning made by you prescribing sedatives?

A. Yes, sir.



Q. Will you look at it and see if you did prescribe any sedatives in the beginning?

A. "3-4-36. Neurocene", which is a sedative, because she complained of nervousness. That is all.

Q. Can you tell from that record whether any other sedatives were being given her on the recommendation of anyone else?

A. Yes, sir.

Q. Please tell us.

A. Apparently Dr. Foxworthy ordered triple bromide effervescence on the 5th. I can go back through the nurses' records, sir, and find out whether anything was given.

Q. I wish you would go through the nurses' records and tell us what other sedatives were given than those you prescribed.

Mr. Mershon:

If Your Honor please, that nurses' record is in evidence here. It seems to me that we are just cluttering the record by having this witness read it. The record is the best evidence of what the records contain.

Mr. Parmer:

We need an interpretation of that. I don't know what a sedative is. It might be a sedative here that I don't know.

The Court:

I suppose he can go on with it.

Mr. Mershon:

With that purpose in view I think that is proper.

317 A. There is another order here that I see, sir; it is neurophosphates.

Q. When was that given?

A. On the 4th.

Q. At whose recommendation?

A. Dr. Foxworthy's; she got that right along.

Q. When you say "she got that right along", what do you mean?

A. She was getting that practically continuously. His orders called for two drams of it, or two teaspoonsful, before meals.

Q. Before every meal?

A. Yes. That is all I see here.

Q. Now do I understand you correctly that this order in regard to this sedative prescribed by Dr. Foxworthy required the giving of it before each meal?

A. Yes.

Q. While she was in the hospital?

A. Yes, sir.

Q. Did you at any time object to the giving of these sedatives?

A. I made notes to that effect.

Q. You made notes to that effect?

A. Yes.

Q. What notes did you make?

A. On the 5th I said that I thought all sedatives should be discontinued.

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Q. And were they discontinued?

A. I will check back here, sir, and tell you. They probably were, though.

Mr. Mayne:

You say that was the 5th?

Mr. Parmer:

Yes, the 5th.

The Witness:

No, sir; they were not discontinued.

(By Mr. Parmer):

Q. In other words, after you said that they should be discontinued, they were not discontinued after that?

A. They were not.

Q. What is the effect of the continued giving of sedatives to a patient in the condition of Mrs. Just?

A. It varies with the type of sedatives you use, sir. In the minor or light sedatives of course we get an evenness of disposition and so on; from the heavier sedatives you can go so far as to knock them out or bring about a narcosis. These sedatives that were given her were more or less mild sedatives; they would settle her down and make her a bit listless and the like at the time. However, these things have a toxic effect on the mental or brain reaction. We see that particularly in our barbituric acid cases, but this was not barbituric acid.

Q. Did you have that circumstance in mind in any way when you made your recommendation?

A. Yes; I wanted to see if I couldn't get her to recall some of the happenings. I wanted to absolutely clear my own mind about it, about the situation.

Q. You mean with regard to the—

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A. With regard to the mental cloudiness, sir.

Q. Mental cloudiness?

A. Yes.

Q. You mean with respect to what had happened on that boat?

A. Yes, sir; in other words, sir, I wanted to see in my own mind whether she was putting on or faking the headaches that she put on so often. Do you see what I mean?

Q. Yes.

A. That is what I was doing.

Q. Then you wanted to let her mind get free?

A. Absolutely.

Q. Without being depressed?

A. Yes.

Q. By the symptoms?

A. By anything.

Q. And if that were allowed you could tell whether these things were genuine or not?

A. Yes, sir.

Q. Now did you have any conversations, other than the one you have already related with Mrs. Bischoff in the room while Mrs. Just was present?

A. Yes, I did. I spoke with Mrs. Bischoff each time I went in the room. She was there you might say practically every visit I made; at each one of these visits there would be quite a few words passed between us as to how I thought the patient was doing and the like. Directly following the time of the talk with Dr. Foxworthy, Mrs. Bischoff told me that she had been advised, that Dr. Foxworthy told her, to enter suit, that that was the thing.

Q. Was Mrs. Just there at the time?

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A. She was there in bed. She was in the room. She said, "Now you see, doctor, that we could not have such a thing as that." She said, "There isn't any sense in anything like that." She spoke very highly of Henry Yeiser and expressed her appreciation of his endeavor to see the young ladies the next time when they were visiting in Miami. She said that that proposition was absolutely out of the question, and she asked that I convey her regards to Yeiser.

Mr. Mayne:

Fix the time of that conversation, if you will.

The Witness:

That was approximately the day following the conversation with Foxworthy.

Mr. Mayne:

When was that; the first conversation?



The Witness:

I don't know. No, it was the second conversation. I talked with him first, sir, on his porch, and the next conversation was in the library of the hospital.

Mr. Mayne:

Several days after the first conversation?

The Witness:

A day or so afterwards.

(By Mr. Parmer):

Q. On the day following that you had your conversation with Mrs. Bischoff in the hospital room?

A. Yes, approximately that time.

Q. Now did you have any other conversation with Mrs. Bischoff after Mr. Yeiser died?

A. I visited the home over there.

Q. No. I said while you were in the hospital did you have any conversation with Mrs. Bischoff after Mr. Yeiser died?

A. I spoke to her on my visits when I went in and out. That is all.

Q. Was the subject of Mr. Yeiser's decease mentioned?

A. It was, but it was just a "regret". That's about all. He was just a patient of mine, and that was that.

Q. Well, now do you know of what Mr. Yeiser died?

A. I did.

Q. Of what did he die?

Mr. Mayne:

We object to that as being immaterial to any issue in the case.

Mr. Parmer:

I will withdraw the question.



Mr. Mehrtens:

I don't think he is qualified to answer the question unless he held an autopsy after his death.

The Court:

The question has been withdrawn. /

Mr. Parmer:

I do not care to pursue it unless you want me to.

The Court:

Objection was made to the whole question and you said that you withdrew it. Apparently that was done.

Mr. Parmer:

Very well, Your Honor.

(By Mr. Parmer):

Q. Were you with Mrs. Just in the ambulance?

A. Yes, sir.

Q. Were you inside the ambulance where she was?

A. Yes, sir.

Q. Now did she do any vomiting?

A. Yes, sir.

Q. Who held the pan on that occasion?

322 A. I did.

Q. Will you tell us what she did in connection with the vomiting which she did?

A. Well, she just vomited in the pan that I held; that was all.

Q. Did anybody hold her?

A. No; it wasn't necessary to hold her; she turned her head and vomited in the pan. When she wanted to vomit I would stick the pan down there and that was that. She would say she had to vomit, and that was that.

Mr. Mayne:

Did I understand you to say that she said she had to vomit?

The Witness:

Yes, she said she had to vomit.

(By Mr. Parmer):

Q. Did she do any other talking on the way over?

A. A few words along; I don't know what.

Q. Was there anybody else inside the ambulance besides yourself?

A. Yes.

Q. Who was it?

A. The owner of the funeral home, Mr. McGhan; it was the aerocar that we were using; it was a large aerocar.

Q. And there was a driver also?

A. Yes, but he was out in the front of the car.

Q. Did that occur on the afternoon of March 2nd?

A. Yes, sir.

323 Mr. Parmer:

That is all.

Mr. Mershon:

If Your Honor please, I think this would be a good point to suspend for noon, and we would like to have an opportunity to go over this record and then call Dr. Howell immediately after lunch.

The Court:

Do you wish to pursue the cross examination immediately after lunch?

Mr. Mershon:

Yes, Your Honor.

The Court:

If we are all here at a quarter to two we will start at that time; if someone is absent, we will wait until two o'clock.

324 Miami, Florida, October 7, 1937, 2:00 P. M.

Met pursuant to adjournment.

Appearances same as heretofore noted.

Mr. Parmer:

Your Honor, there is one matter that I had forgotten to go into and I would like to do it now.

The Court:

All right.

Thereupon DR. SPENCER HOWELL, previously called as a witness on behalf of the Petitioner, resumed the stand and was examined further as follows:

Direct Examination (Continued).

By Mr. Parmer:

Q. Dr. Howell, at any time after you had seen Mrs. Just in the hospital on the first day that she was brought there, did you see Miss Grunow; did you see Miss Grunow later on in the day?

A. May I ask you do you mean did I see Miss Grunow that day?

Q. After you got there to the hospital, after bringing Mrs. Just there?

A. Yes, I did.

Q. Whereabouts did you see her and when?

A. Aboard the boat later on in the afternoon, sir.

Q. Will you describe what her condition was at that time and whereabouts on the boat did you see her?

325 A. She was still in Mr. Yeiser's room, on his bed, and apparently feeling very good. At that time I instructed her that I wanted her to get off the boat.

Q. Did she say anything about that?

A. She told me that she wasn't going to get off the boat, that she was going to spend the night there, that she had no idea of getting off. I told her I was sure she would change her mind; that after all Mr. Yeiser was a sick man and that she was occupying his room. She said that was all right, that he could sleep somewhere else, that it didn't make any difference to her, and that she was going to stay there, and I told her no. I left strict orders that she was to be taken off the boat and if necessary to bodily remove her to her home.

Q. Did you return to the boat again?

A. I returned to the boat again, but I didn't see her any more after that.

Mr. Parmer:

That is all.

#### Cross Examination.

By Mr. Mershon:

Q. Doctor, how long have you practiced medicine in Miami?

A. Since 1934; December, 1934, I think it was, Mr. Mershon.

Q. So you had been in practice for about a year and two months, that is, the year of 1935 and two months in 1936, when this thing happened?

A. Approximately, sir.

Q. You stated that you were Mr. Yeiser's personal physician, did you not?

A. Yes, sir.

326. Q. Did he have any other physician in attendance on him?

A. At that time, sir?

Q. At that time.

A. No, sir.

Q. How often did you see Mr. Yeiser during the two months immediately preceding this accident?

A. Mr. Mershon, I was on the boat on and off on an average of two and sometimes four or five times a day, in accordance with the calls that I would get from the help on the boat, you see.

Q. Who would call you?

A. Either the Captain or the engineer or one of the seamen, or one of the mates.

Q. What would be the reason for the calls?

A. Maybe he would desire my presence. May I say, Mr. Mershon, that Mr. Yeiser at the time I went on the case told me that he wanted to be co-operative, but he knew he would not be. Do you see what I mean? He wanted to get over his disability, but he was too far into it and he wanted me to help him. He said at the same time that he was not going to take orders from me or from anybody else, but that he would do the best he could.

Q. Did these calls that you received come from Mr. Yeiser on the boat?

A. Sometimes, yes; sometimes they came directly from him, or just from the men on the boat, either the chief or the captain. Someone would call me to come over and say, "Doctor, Mr. Yeiser is not so well", and I would come.

Q. The boat during that whole two months was tied up at the Royal Palm Docks?

327. A. No, it wasn't.

Q. I mean when it was tied up at all in Miami that was its regular docking place?



A. No, sir, it wasn't.

Q. Did you ever go aboard the boat at any other location in Miami?

A. Yes.

Q. Where was that?

A. In the river.

Q. Miami River?

A. Yes, in the river; not in the river, but out in the Bay; she laid in the Bay most of the time.

Q. When it was docked, as distinguished from being out in midstream or midbay, it was docked at the Royal Palm Docks, was it not?

A. If you call the Miami River a portion of the Royal Palm Docks, sir, it was.

Q. Was Mr. Yeiser living aboard the Friendship II at that time?

A. Yes, sir.

Q. On the morning you received this call, on the morning of March 2nd, who was it that you talked to over the telephone,—who was it that talked to you over the telephone?

A. If my memory serves me correctly, sir,  
328 it was the chief engineer, although I am not sure.

Q. Well they had called you prior to that time and you recognized it as a member of the crew calling you?

A. Yes, sir.

Q. Did he tell you what you were wanted for?

A. He told me they had an accident aboard the boat, and that was all.

Q. He didn't tell you the nature of the accident?

A. No.

Q. He didn't tell you the nature of the accident?

A. No.

Q. He didn't tell you it didn't involve Mr. Yeiser?

A. No, sir.

Q. Was that call any different from the calls you had been previously receiving from the crew on the boat?

A. Yes, sir.

Q. Was it different in urgency or different in tone?

A. Different in urgency.

Q. What did you do upon getting the call?

A. I made it just as fast as I could down there to the boat.

Q. Did you take any instruments or appliances or anything with you?

A. Well, I carry a fairly well equipped bag,  
329 sir, always.

Q. Does that meet any kind of accident or emergency?

A. Relatively, sir.

Q. Do you mean to say that you went down there without making any inquiry at all as to the nature of the accident?

A. Yes, sir.

Q. Before leaving?

A. Yes, I very seldom make inquiry into an accident before going; if I am told it is emergency, I hurry.

Q. Even though you recall the patient or whose representative is calling you?

A. I took it for granted that they knew how to differentiate an emergency, sir; otherwise, I didn't go into it then; I got into it later, however.

Q. Who employed you to treat Mrs. Just and Miss Grunow?

A. Well, I was called to the yacht and I assumed that the owner was probably responsible.

Q. Well, doctor, were you going there as the physician of these young ladies or were you going there as Mr. Yeiser's regular physician, as a physician for him?

A. I was going to take care of any emergency there, whether it was one of the crew,  
330 Mr. Yeiser or whoever might have been hurt.

Q. Regardless of the nature of your employment you regarded yourself as their personal physician for that occasion and the ensuing time, did you not?

A. Well, surely, if you want to state it that way; yes, sir.

Q. Is that a fair statement?

A. Yes, sir. I considered myself the personal physician, and I would do that as a matter of course unless there is someone else associated in on the case at the time.

Q. You owed to them each and every duty that a physician owes to his patient?

A. Quite true, sir.

Q. And you undertook to discharge that duty to the best of your knowledge and ability, did you not?

A. Yes, sir.

Q. Now do you recall that sometime in the month of November, 1936, Mr. W. O. Mehrtens called at your office, stating that he was one of the firm of attorneys who represented Mrs. Just, your former patient, and Miss Grunow, and conferred with you about the case?

A. I remember someone called, Mr. Mershon, but as to who it was I don't know.

Q. Do you recognize this gentleman standing up here (Mr. Mehrtens)?

A. No, sir; I am sorry to say I don't.

Q. Do you recall having a discussion with  
331 him when he asked you to please let him have a letter containing a full statement of your connection with the case, and your diagnosis and treatment; do you recall that?

A. I do.

Q. Do you recall promising him that you would do that?

A. I made no definite promise, sir.

Q. Did you make any promise?

A. I made no definite promise about it at all.

Q. Did you tell him you would not or that you would?

A. I didn't tell him I would and I didn't tell him I wouldn't, sir.

Q. How did you reply to him?

A. Well, I tried to be as evasive as possible.

Q. You evaded him when he asked you the point-blank question?

A. I didn't care to be mixed up in the thing. I was drawn into it unfortunately, and I didn't care to be mixed up in any case of any kind, here or elsewhere, and I am sorry that I got mixed up in it now, if you will permit me to say so.

Q. You did not question the fact that he represented Mrs. Just and Miss Grunow?

A. Well, it wasn't for me to question.

Q. You discussed the matter with him, didn't you?

A. I probably did.

Q. You knew of no reason why you should not give such a written statement, did you?

A. If I did I didn't make it known, sir.

Q. You did not make it known?

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A. No, sir.

Q. And you say you did not promise him to send the statement?

A. Not that I remember.

Q. Had you given a written statement prior to that time to the Yeiser estate or to anyone representing them?

A. No; I had not given them a statement prior to that time, if I remember right.

Q. When did you give them a written statement?

A. I don't remember, Mr. Mershon, when I did. Mr. Coleman represented the Yeiser estate and I gave him a deposition, if you call it that.

Q. Did you get any waiver or the patients' approval before doing that, or make any effort to?

A. I did not.



Q. Yet Mrs. Just was your patient?

A. That is right, sir.

Q. And you have not to this day given Mrs. Just or her attorneys the benefit of a written statement concerning your connection with their case?

A. No, I did not.

Q. Isn't it a fact that after you talked to Mr. Mehrtens on two separate occasions that you received a very courteous written letter from his referring to your promise to him to give a written statement, and in which he asked if you would be good enough to do so?

A. I received a letter not only from Mr. 333 Mehrtens but I received a letter from some firm in St. Louis.

Q. I am not asking you about that now. We will come to that later.

A. All right.

Q. I show you a letter marked for identification as Claimants' Exhibit No. 10, and ask if you received in due course the original of the letter of which that appears to be a carbon copy?

A. I probably did, sir; I can't say definitely, but I probably received this.

Q. I also hand you a paper which has been marked for identification as Claimants' Exhibit No. 11, and ask you if you received the original of which that appears to be a carbon copy, except for the written signature?

A. I probably received that also; I don't know.

Q. Did you reply to either of those letters?

A. I did not; I have not replied to any correspondence of any kind on the case.

Q. In the letter of November 27, 1936, it is stated: "Dear Dr. Howell: No doubt the press of business has caused you to forget our conversation of November 20th, during which you promised to write me a letter with reference to the medical history of Mrs. Charlotte Just and Miss Anne Grunow from the time you were called



into the case on March 2, 1936, until they were discharged by you.

I would greatly appreciate such a letter and wish you would include therein the history of the case as you knew it; your connection with the case; condition of 334 the patients at the time you first saw them, including the symptoms present and your diagnosis, as well as your immediate treatment and the hospital history and treatment; whether or not they were discharged as cured and any prognosis or aftermath of the effects of their illness that you may be able to make.

Thanking you in advance for your courtesy and cooperation, I am

Very truly yours".

You never replied to that letter nor did you disavow the promise which the letter said you made.

A. My dear sir, just because someone said I promised to do so and so, is no sign that I promised them anything. I probably received the letter, and as I told you before I didn't care to be mixed with the case in any way whatsoever, and I let it go, thinking it would be better to forget it.

Q. You felt that you owed your former patients no duty whatsoever to discuss their case as you knew it either with them or their counsel, did you?

A. I felt that the case was most unfortunate all the way around.

Mr. Mehrtens:

We move to strike the answer from the record on the ground that it is not responsive to the question.

The Court:

That statement is not responsive and it is not relevant. It will be stricken.

Mr. Mershon:

Repeat the question.

(Thereupon the preceding question was read by the Reporter as above recorded.)

335 A. I didn't feel that I owed them anything.

Q. By the same token did you feel that you did owe some duty to the Yeiser estate or their representatives, without the permission of your former patients, to render to them a written statement of your treatment of these patients and their case as it came to you in the confidential relationship of patient and physician?

A. What was the question again?

(Thereupon the preceding question was read by the Reporter as above recorded.)

A. I felt that I owed no duty whatsoever, but if I owed any duty whatsoever it was to Henry C. Yeiser.

Q. How long have you had that feeling?

A. Sir?

Q. How long have you had that feeling as to who you owed that duty?

A. Since the day I was employed on the case.

Q. Since from the minute you got the call on the telephone?

A. Yes, sir.

Q. Prior to your receiving the call on the morning of March 2nd had you ever treated carbon monoxide cases?

A. Yes, sir.

Q. You had?

A. I had seen one or two of them, sir.

Q. Had you ever undertaken to treat them yourself?

A. Yes, sir.

Q. Do you have and did you have some idea  
336 of what treatments were given for those cases?

A. Yes; if I had not I couldn't have gotten  
by the State Board, sir.

Q. You will notice I said "some idea". I am not trying to commit you to knowing all of them.

A. All right.

Q. As you understand it, as you understood it, what would the treatment consist of when you are first called on a case where the victim had been exposed to carbon monoxide gas?

A. The treatment, sir, is supportive.

Q. What?

A. Supportive. Carbon dioxide and oxygen, and that's the only treatment of any value whatsoever.

Q. Then the elimination of carbon dioxide is to get the carbon monoxide expelled through the lungs?

A. No, sir; the oxygen eliminates the carbon monoxide, not the carbon dioxide.

Q. Maybe I said the wrong thing; you evidently understood it as I did not intend it. I will let you tell us briefly what effect on the patient does the breathing of carbon monoxide have. Tell us that first.

A. Carbon monoxide unites to the hemoglobin of the blood in proportion to volume, confinement and so on, hence it renders the blood unable to take up oxygen in normal atmospheric conditions.

Q. What effect does that have on the patient?

A. Well, it deflates them of oxygen.

337 Q. It creates asphyxiation?

A. Yes, sir.

Q. Suffocation for want of oxygen?

A. Yes, sir.

Q. What effect on that condition does it have for the patient to inhale a mixture of pure oxygen combined with carbon dioxide?

A. What effect it has on the patient?

Q. On the patient and the condition where the hemoglobin is combined with the carbon monoxide?

A. The oxygen displaces the monoxide in the blood, sir.

Q. What happens to the monoxide?

A. Well, it is eliminated.

Q. Through the lungs?

A. Surely.

Q. Through the exhaled breath from the lungs?

A. Yes.

Q. So we are right back where we started, that the inhalations of carbon dioxide mixed with oxygen is an eliminative treatment to eliminate carbon monoxide?

A. That is right.

Q. What does the supportive treatment consist of?

A. That is used in case your patient shows signs of a heart-failure, for instance, caffeine was given—

Q. That is a stimulant?

A. Stimulant, yes. Now there are various forms of supportive treatment given.

Q. You mentioned caffeine. What is the form of caffeine or the combination of it you give as your supportive treatment?

A. Caffeine sodium benzoate; that is the most common form, sir, and that is given by hypodermic.

Q. Have you not overlooked one very important element of treatment of the patient when you first come to him while he is under the influence of this carbon monoxide? I am not trying to catch you on it, but haven't you overlooked the elements of quiet, rest, immobility?

A. Mr. Mershon, to the contrary, no; not exactly, sir, because if a person is knocked out with carbon monoxide they are the same as under an anaesthetic; it doesn't make much difference whether you dance



around them all night, because they are unconscious of it.

Q. You dance around them,—I agree with you.

A. All right.

Q. But isn't one of the cardinal rules that in those cases you shall not apply any counter shock such as striking them or shaking them or dragging them around, but you leave them quiet?

A. No, I don't think that is, sir; no, sir.

Q. You have never seen that or heard that suggested?

A. No, sir.

Q. May I ask if you remember where you got the information that you have just given as to the treatment for this type of case?

A. Well, it is basic; I don't know just where I acquired that knowledge.

Q. That is what you remember?

339 A. I remember that back in my old school days; that is what I was taught in medical school and so on and so forth.

Q. As a matter of fact, doctor, you did not move Mrs. Just from where you found her on that deck couch on the upper deck at the stern of the yacht, Friendship II, did you?

A. She wasn't moved at all.

Q. You didn't order her moved?

A. No, sir.

Q. Did you order her to stay there?

A. I didn't order anything relative to that. There was no reason and I had no reason to move her or disturb her. I said, "let her alone; let her rest it off." That was all.

Q. So you did tell them to let her alone?

A. I said, "Let her alone." I said, "Give them a hypodermic", and I scheduled it for them, giving them carbon dioxide and oxygen.



Q. Didn't you know that as the physician in charge there that whatever you said would go and whatever you said would be done; didn't you know that?

A. That is true in most cases, yes.

Q. And from what you stated on direct examination, doctor, if they don't do what you wish and don't let you boss it, you don't have anything to do with it?

A. I do not, but sometimes I am forced to do otherwise.

Q. So it is a safe assumption and a proper assumption here, doctor, that she remained undisturbed because you told them to, until such time as she was taken to the hospital?

A. That is a technical point. If the woman  
340 had wanted to get up and go to the toilet or something of that kind, certainly she would not have been denied that privilege.

Q. But she didn't make any effort to do that?

A. I don't know that she did, sir; not at all.

Q. Who got the tank with the carbon dioxide and the oxygen in it, together with this respirator or inhaler, or whatever you call it, attached to it, aboard the boat?

A. McGhan's ambulance picked that up for me.

Q. So you told them to get it and bring it to the boat?

A. Yes, sir.

Q. Why did you think you were going to need oxygen and a breather if didn't know what—

A. That was a safety first measure. I knew what the treatment of carbon monoxide was, and I wanted that there as a protective measure.

Q. When you got there then you immediately proceeded to administer to Mrs. Just and Miss Grunow what you now say is the regular treatment for carbon monoxide poisoning?

A. Yes.

Q. That is, your caffeine benzoate, your oxygen and carbon dioxide and we will say rest. You didn't have her moved?

Q. When did you decide to take Mrs. Just to the hospital?

A. That afternoon.

Q. You thought that her condition had improved to such an extent that it would be safe to move her to the hospital at that time?

A. No, I didn't think that at all.

Q. You didn't think it had improved?

A. I moved her to the hospital more as a protective measure and to get her off the boat there, because she was out there on the aft deck of the boat and I felt like she wasn't going to react or sober up, or whatever you want to call it, and that the best place for her was in a hospital and there treat her as conditions warranted it.

Q. You were still pumping the oxygen to her to get a reaction?

A. Well that was given her along, yes.

Q. And you say that as a protective measure you decided to send her to the hospital?

A. Yes.

Q. And you say that was to clear the boat. Was that to protect Mr. Yeiser or his interest or was it to protect her interest?

A. No, it was for the protection of everyone concerned.

Q. In your studies of carbon monoxide did you learn anything about the one infallible test to determine whether it was present in the blood?

A. Not being an expert on carbon monoxide, sir, I cannot go into details on it. I do know of one test, Mr. Mershon, but whether it is the one infallible test I don't know.

Q. Suppose you tell us the one you knew about the day you went on the boat.

A. The only one I knew of was Haldane's  
342 test.

Q. What is that?

A. I cannot give you the details of it. I am not a laboratory man.

Q. Is that a test in which you take some blood?

A. Yes.

Q. Is that the color test?

A. Yes.

Q. That is a test that a layman can perform by taking a few drops of blood?

A. No, no layman could perform it. It is wrong to say that.

Q. Isn't it regarded as a test which a layman can perform?

A. No, it is a test for a laboratory expert to perform, and after he perform the test he has to make his mathematical deductions from his formula used.

Q. Isn't there a quick and simple test by which a few drops of blood are drawn from the fingers or any other part of the body, which is diluted and which can be spread out where the color of the blood can be observed, and if carbon monoxide is present to any degree the blood will be pinker than the normal color of the blood?

A. If so, sir, I don't know it.

Q. You never heard of that?

A. I don't know it.

Q. Did you make any effort to have a blood test made from 8:00 or 8:30 in the morning, when you first got on the boat, until the 5th of March?

A. I made no attempt to make a carbon mon-  
343 oxide test whatsoever.

Q. On the 5th of March, however, a blood test was made at the hospital, wasn't it?

A. A blood test?

Q. Excuse me. I am no more expert in your line than you are in mine. I refer to sheet 9-E of Claimants' Exhibit 9 headed "urine" and "blood". What does that reflect with reference to the blood?

A. That is what we know as a blood-count, and if you care for me to I will repeat it and give you my interpretation of it. Is that what you wish?

Q. No.

A. That is a blood-count, sir; that is all; to tell whether you have any lower hemoglobin, to tell whether the red blood-count is normal, to tell whether or not your white count is normal and to tell the distribution of the cells therein—

Q. Was that the first and only test made in this case of Mrs. Just's blood?

A. Yes, that is the only one as far as I know.

Q. It was pretty safe to make one by that time and not show carbon monoxide?

A. That will not show anything regarding carbon monoxide, that will tell you whether there has been any damage to the hemoglobin set-up in the blood though. It will tell you that, and that is pictured there.

Q. Now when you took Mrs. Just to the hospital I believe you accompanied her in the ambulance?

A. Yes, sir.

Q. When did you write up this personal history on page 9-A of Claimants' Exhibit 9, which you say bears your signature on the bottom?

A. When did I write that?

Q. Yes, when did you actually write that?

A. I wrote that upon arrival in the hospital or shortly thereafter, after I had checked the woman up there.

Q. And you got there about 2:45?

A. Somewhere in there.

Q. How long did it take you to check her up?

A. Well, that is relatively a short procedure.

Q. Thirty minutes?

A. Not over that, I don't think.

Q. When you do that is that filed in the record room of the hospital?

A. No, sir; that whole record there remains on the chart throughout the stay of the patient in the hospital.

Q. So this would be available to any physician, whether properly attending her, whether invited or otherwise, or when he walked in her room; that is, this would be available?

A. It would not be left in the room; it would be left out on the nurse's chart desk. As a courtesy among men, Mr. Mershon, why we do not pick up other men's charts, though.

Q. Is that all-inclusive with you or purely personal?

A. No, it is that way considered all over; it is  
345 a courtesy from one to the other, unless you are asked to view it and give your interpretation.

Q. All right, I refer to the "Physical Examination" on page 9-B of Claimants' Exhibit 9, which bear your signature and which says: "Working diagnoses, general condition, physical findings", under which is your signature, the sheet being dated March 2, 1937. I will ask you if that was prepared by you at the same time you prepared the Personal History and placed on the chart in the patient's room?

A. That was prepared at the same time and filed in the chart records; just the same as the others.

Q. When you say "in the chart records", you mean attached to her chart?

A. Yes, that is attached to the chart and the chart is left on the nurse's desk in what we call a chart rack out in the hall; that is never carried into the patient's room, except by the doctor.

Q. It is available to anyone who wants to look at it or who is interested enough to look at it?



A. No, you can't say that either. It is available to physicians.

Q. That is what I mean.

A. All right.

Q. Physicians who are properly in the hospital and who are recognized as having the right to visit there, can take it without asking you anything about it?

A. No, sir, that cannot be done. For instance;  
346 if you had a patient there, I couldn't go in there and pick up your chart just at will; if so, the nurse in charge of the floor would take it away from me at once.

Q. Now as a matter of fact you say Dr. Foxworthy came in on this case, and this same record shows that he came in about four o'clock in the afternoon?

A. Yes, sir.

Q. This record shows that Dr. Foxworthy had access to the records and to this patient in the hospital at four o'clock in the afternoon on March 2nd.

A. I don't know; I haven't check it up.

Q. Well, I will afford you that opportunity (handing document to witness).

A. All right; he was in the hospital at 4:00 P. M.; there is your nurse's record on it.

Q. On March 2, 1936?

A. Yes, sir.

Q. You were in there at 2:45 and it took you thirty minutes to fix the record, so that this record, these two pages of Personal History and the physician's examination had been completed by you and were in the chart rack when, according to these records, Dr. Foxworthy walked into the hospital?

A. Yes, sir.

Q. And they were there where he could see them?

A. That is right.

Q. In your handwriting?

A. Yes.

Q. And as you say, he was put on notice that  
347 you were in charge of the case?

A. I didn't say that. I beg your pardon, I don't know whether he was put on notice that I was in charge of the case; the natural assumption was that I was in charge of the case, and this record shows my name, that she was my patient.

Q. He was not put on notice that you were protecting Mr. Yeiser's interest in this capacity when you signed as physician in charge; he wasn't put on notice that you were really Mr. Yeiser's physician?

A. Mr. Mershon, please let me correct that. I wasn't protecting Mr. Yeiser's interest; I was looking after the interest of my patient. I took care of my patient irrespective of anything.

Q. But you wouldn't let her know anything about it later after she got out?

A. She never came to me.

Q. Her lawyers came to you.

A. That is a different story.

Q. Now, doctor, in the course of your studies or your practice did you ever have occasion to read or examine a bulletin put out by the Department of the Interior, United States Bureau of Mines, John W. Finch, Director, entitled "Report of Investigation" on the subject of "Dangers of and Treatment for Carbon Monoxide Poisoning" prepared by R. R. Sayers and W. P. . . . ., dated May, 1923, and revised in May, 1935, which I show you?

A. No, sir, I have never seen it, sir.

Q. Now if in that text or report prepared by  
348 the Department of the Interior in speaking of the diagnosis of carbon monoxide poisoning this is said: "A diagnosis of carbon monoxide poisoning is usually made from a correlation of the history and place of possible exposure which the symptoms produced. But this is not always positive evidence, because carbon

monoxide exists at unsuspected places, and the symptoms produced are common to other causes. The only infallible test is by examining the blood for carbon monoxide hemoglobin. A method and an apparatus for this test have been developed by the Bureau of Mines. By its use a small amount of blood (0.10 CC., which can be procured from a puncture wound in the finger) can be quantitatively examined in a few minutes for carbon monoxide and a true diagnosis made. The apparatus is portable (pocket-size), and the technic for use is sufficiently easy for unskilled users to make an accurate diagnosis, as well as to determine later when the carbon monoxide has been removed." Do you take issue with that?

A. No, sir; I don't take issue with it at all.

Q. Dr. Howell, why, may I ask, did you prepare for filing among the records of the St. Francis Hospital these records dated March 2, 1936, consisting of the Personal History and the Physical Examination, all of which you stated you did prepare and sign, as well as the other records which were prepared and signed and caused to be filed in the St. Francis Hospital pertaining to Mrs. Just's case; why did you do that?

A. As a hospital record.

Q. Did you realize that you were under a  
349 legal duty to prepare such information and caused it to be filed there?

A. No.

Q. Were you familiar with Section 3287 of the Compiled General Laws of Florida which says:

"All superintendents or managers, or other persons in charge of hospitals, almshouses, lying-in or other institutions, public or private, to which persons resort for treatment of diseases, confinement, or are committed by process of law, shall make a record of all the personal and statistical particulars relative to the inmates in their institutions at the date of the approval of this

law, which are required in the forms of the certificates provided for by this Chapter, as directed by the State registrar; and thereafter such record shall be by them made for all future inmates at the time of their admittance. And in cases of persons admitted or committed for treatment of disease, the physician in charge shall specify for entry in the record, the nature of the disease, and where, in his opinion, it was contracted, or if injured the nature and cause thereof. The personal particulars and information required by this section shall be obtained from the individual himself if it is practicable to do so; and when they cannot be so obtained, they shall be obtained in as complete a manner as possible from relatives, friends, or other persons acquainted with the facts."

Were you acting under any knowledge or regard for that statute?

A. Mr. Mershon, it so happens that we visiting physicians—it is a rare thing that we write the history and physical. I write my own, however, but that  
350 is usually done by the interne in the hospital.

Q. But in this case you prepared these records to be filed in the hospital as a part of its permanent records?

A. Yes, certainly.

Q. What is the symbol of oxygen, the chemical symbol?

A. O<sub>2</sub>.

Q. O<sub>2</sub> is the symbol for oxygen?

A. No; just a straight "O" is oxygen; I am no chemist.

Q. Do you make that mistake often?

A. I am not a chemist.

Q. Why did you say O<sub>2</sub> was the symbol for oxygen?

A. Well, because I get in the habit of just writing

C0<sub>2</sub>. I use C0<sub>2</sub> and oxygen quite a bit in inhalation treatments in hospitals.

Q. When you write C0<sub>2</sub> what does that stand for?

A. That is carbon dioxide.



Q. You first thought that O<sub>2</sub> was just plain oxygen?

A. No.

Q. And voluntarily you replied that the symbol for oxygen was O<sub>2</sub>?

A. That is right.

Q. Did you feel that way—did you make that same involuntary mistake when you wrote up this chart?

A. I couldn't say that I did. It is written out there where I say "oxygen".

Q. Where you should have written plain "O"  
351 you say, "Given CO<sub>2</sub> 5% and oxygen 95%"—

A. That was a slip-up.

Q. That is one of the records in this hospital as made by you?

A. That is right.

Q. All right. I call your attention to page 9-A of Claimant's Exhibit 9, called the "Personal History". At the top of the page are written on the typewriter the letters: "CO". Can you tell us whether that is CO<sub>2</sub> or CO?

A. I don't know; I didn't write that; I had nothing to do with that.

Q. So you do not take the credit for writing in here the physical diagnosis as carbon monoxide poisoning; you didn't write that at all?

A. Here is where I put my remarks—

Q. Let's talk about this other first.

A. No, I didn't write that.

Q. You take no credit for writing that diagnosis as carbon "dioxide" poisoning?

A. No, I take no credit for that.

Q. But you do take credit for that same sheet under "Chief complaint" for writing in your own handwriting "CO<sub>2</sub> poisoning"?

A. I do.

Q. You didn't slip on that "O"?

A. I didn't slip on that "O".



Q. You didn't slip on that one?

A. No.

Q. You meant to write "02"?

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A. There I put down what I meant to write.

Q. You did actually mean to write carbon dioxide or C02 there?

A. Yes.

Q. But when you put the 2 on the 0 you slipped when you did that?

A. Yes, I slipped there.

Q. Do you mean to tell this Court, doctor, in cold blood and deliberately as a doctor, as a doctor, forgetting about your oath, that you deliberately meant, where in your own handwriting C02 poisoning appears on these first two or three sheets, that you meant to write C02, carbon dioxide poisoning? Just forget about your oath; I am asking you as a doctor.

A. That is all right; I meant to give the inference of carbon monoxide poisoning; that is correct.

Q. And Dr. Harris so understood it when he came out there that night?

A. That is right.

Q. Because you discussed it with him, didn't you?

A. That is right.

Q. What time did you call Dr. Harris?

A. I don't know; I don't remember just exactly what time it was, Mr. Mershon.

Q. Were you out there when he came that night?

A. No, I wasn't.

353 Q. Did you confer with Dr. Harris over the telephone before he came out?

A. Yes, sir.

Q. Did you give him briefly the case history?

A. Yes, I did.

Q. You told him you understood it was carbon monoxide; that was your diagnosis to him?

A. No, I didn't go into details regarding it; afterwards we met in the hospital later and I went into details with him.

Q. In any event, you gave him—

A. A tentative impression.

Q. A tentative impression, and gave him a carbon monoxide history?

A. Yes.

Q. So much so that before he left his office and went out there, he took with him a tube of methylene-blue as a possible antidote?

A. I don't know where he got it; he had it when I got there.

Q. You discussed with him and approved the giving of it?

A. No; he gave that before—

Q. He was giving that when you came in?

A. He had finished giving it when I got there.

Q. Have you ever given methylene-blue for carbon monoxide poisoning?

A. No, I haven't.

Q. Did you understand it had been at least considered and practiced as one of the remedies, though since disallowed?

A. That was considered so, yes, but there  
354 are many hazards in using it; I never use it because of the hazards.

Q. Particular, where the patient may have a history of allergy, where it might cause something?

A. In this case that was given intravenously and it might throw a person into a shock and they are gone like that.

Q. In this particular instance when you got there the methylene-blue was being given and the reaction was not favorable, was it?

Mr. Parmer:

I object to that question.

Mr. Mershon:

I will withdraw the question.

(By Mr. Mershon):

Q. What time did you get there with respect to the giving of the methylene-blue?

A. It had been given when I arrived.

Q. Did any antidote have to be given for it, adrenalin or anything?

A. I don't remember; I don't think so.

Q. That was a closed incident when you got there?

A. Yes, sir. Of course they were fussing around at the time I got there.

Q. Did you say Dr. Harris' diagnosis appearing on page 9-C of Claimants' Exhibit 9 confirmed your own, where the words are written: "Note: The physical examination is essentially negative. In view of the history it seems likely that the patient had a case of carbon monoxide poisoning. There is undoubtedly a functional element present". I am asking you if you saw Dr.

355 Harris' diagnosis as I have just read it appearing on this chart, and in that connection I am asking you to state whether that is Dr. Harris' diagnosis as you saw it?

A. I haven't read this part of the chart at all, sir.

Q. Will you please read it?

A. As far as swearing that that is Dr. Harris' or notes of Dr. Harris, I don't know, because I didn't see him write it.

Q. You don't know his signature?

A. No, I don't know his signature.

Q. I will ask you to state whether Dr. Harris concurred in your diagnosis of carbon monoxide?

A. Did he concur?

Q. Yes.

A. As stated before, we discussed the case outside of the room afterwards, and the other possibilities.

Q. Did he concur in your final diagnosis as entered on this record of this patient's case, that it was carbon monoxide poisoning?

A. He concurred with my ideas on the case. Now whether he wrote it down there or not I don't know.

Q. Your final idea as expressed in this chart was carbon monoxide poisoning to Mrs. Just, is that right?

A. Yes, I wrote that.

Q. That is what I asked you.

A. All right.

Q. The mental reservations that you now have, but did not express in writing at the time or to the patient's family when you were talking to them or to Dr. Foxworthy, were mental reservations formed as a result of your regard for Mr. Yeiser's interest?

A. No, sir.

356 Q. In other words, they were just mental reservations?

A. Yes, you can call them that, I suppose.

Q. You mean to say that you fraudulently, in preparing these charts and filing them, intended to deceive the hospital, deceive the family of the patient and deceive every reputable physician who came into that hospital and who might look at that chart or have any interest in that case?

A. In the first place, anyone that looks at that chart must necessarily call me and get my permission; the hospital extends me that courtesy. As far as deceiving the doctors, Mr. Mershon, I discussed this case with various members of my profession, my seniors, and discussed it in full and told them. As far as deceiving the family goes; yes, I did. If that will help them and help these girls out with people who put them on a pedestal,

by saying that they were not drunk,—then I have helped them out that much.

Q. Did the hospital call you up, doctor, before Dr. Foxworthy saw that record?

A. No, they didn't, but it is customary that they do, sir.

Q. So apparently Dr. Foxworthy at least may have been misled by this?

A. No. I just think that the old gentleman took it on himself to look at it, and that was that.

Q. Do you think Dr. Harris may have had  
357 such an interest in the case that merely to protect the case he would have joined in an express written diagnosis of carbon monoxide poisoning?

A. I don't know that he would; I don't know that he would have.

Q. He was merely consulting with you?

A. He was merely consulting with me; that's all.

Q. He was not Mr. Yeiser's personal physician?

A. No, sir, he had no interest in it whatever, but he also knew the other side of it, too, Mr. Mershon.

Q. And knowing it he wrote here what he did?

A. Yes.

Q. Where did Mr. Yeiser keep his liquor aboard the boat?

A. That I couldn't tell you, sir.

Q. You never could find it when you went there?

A. I didn't care to find it. I don't know where he kept his extra supply, but I hid the supply of liquor that was in use at the time; I knew where that was.

Q. Were you interested in keeping that up or down?

A. Just what do you mean; do you mean the supply or the amount of his consumption?

Q. No, the supply. Did you permit him an unlimited supply on the boat?

A. I had nothing whatever to do about how much he had on the boat. I was trying to help the man, trying to cut down the volume he was drinking per day.



Q. I am very much interested, and I am sure  
358 the Court will be, in knowing how you can cut  
... down liquor consumption and leave any supply  
of it around him?

A. You must remember I had a day and night nurse  
on him constantly; not only that, Mr. Mershon, but I  
had the support of the whole crew trying to help me  
out on the case, trying to cut his liquor consumption  
down.

Q. How long did you keep the day and night nurse  
with him?

A. So long as he required it.

Q. So he must have had a day and night nurse on the  
boat when they made the trip down to the Keys?

A. No, they were not on that trip.

Q. Was that the only trip they were not on?

A. That was the only time they were not on the  
boat.

Q. How often did he make these trips?

A. That was the only trip that he made.

Q. In the whole two months?

A. That I know of.

Q. That's the only one that he told you about?

A. That's the only one he told me about.

Q. I think you said that you went aboard anywhere  
from one to three times a day every day?

A. That is right.

Q. So he could not have made any other trips after  
that?

A. That is right.

Q. You say the day and night nurses were relieved  
the day before in order for him to make the trip?

A. No, it wasn't just that way, sir.

Q. I want you to explain it then, because I  
359 think that inference may have been left. If that  
is not correct, please explain it.

7-52-34  
A. The day and the night nurses were both, if course, working with me and acting under my orders. As I stated before, I had tried to get the co-operation of everybody to break up the trip, but it didn't work. Mr. Yeiser wanted me to go on the trip and invited me to go; he told me that he would pay me for my time and so on, and asked each of the girls to go, the nurses, and that he would compensate them just as though they were working every day when the boat was docked.

Q. You mean this trip that was planned for March 2nd,—I mean this unfortunate trip?

A. The last trip he made.

Q. He invited you all to go?

A. As a consequence I would not go and I was advising him against it, and the girls pulled off the case altogether; when the orders were not carried out as issued they felt like they were no longer needed on the case, and that was that and they pulled off.

Q. How long was that before that Friday afternoon when the Friendship II went down the Keys, which was about February 28th?

A. They pulled off just before it left.

Q. That same day?

A. I don't know what day it left, Mr. Mershon.

Q. You say they got off the boat, the nurses  
360 did, the same day the boat went down on the trip in the Keys?

A. If my memory served me right as to that detail, they day and night nurses met there at the boat when relieving each other, and it was finally settled that they were going, and if I remember correctly these other persons had already come aboard the boat; I am not sure about that detail; anyway, they pulled off the case and were not on the trip.

Q. They were offered the opportunity to go?

A. Yes.

Q. And were urged to go?

A. Yes.

Q. And you were, too?

A. Yes, by Mr. Yeiser alone.

Q. He was master or owner of the boat?

A. That is right?

Q. Isn't it a fact that a trip had been talked about and planned for a week preceding the week when this accident occurred?

A. It had been.

Q. And it had been called off?

A. Yes.

Q. Who called it off and why was it called off?

A. Oh, Mr. Yeiser called it off, I guess; I think it was because of inability to get his friends together or something of the kind; I don't know just what the reason was.

Q. Was Mr. Yeiser drinking about that time?

A. He was drinking all of the time.

Q. Are you prepared to say that if Jack McKay says he called that trip off because Yeiser was drinking and he wasn't going with him, wasn't going to have guests aboard,—was McKay telling the truth?

A. If he stated that, it is not the truth, because Mr. Yeiser drank until an hour or so before he was dead.

Q. If McKay says that he refused to go or to permit his guests to go because Yeiser was drinking more than usual and he didn't want to start out with him in that condition, is that untrue?

A. As I stated, Mr. Mershon, I had him on a regulated schedule downwards; at the time of his departure on the trip I had gotten him down to four ounces a day.

Q. That was the day he left?

A. That was the day before he left; his consumption was four ounces daily.

Q. What was it the week before, towards the week-end of the week before?

A. I don't know; I don't remember that; it was progressively cut down from a gallon, sir.

Q. Did he have numerous relapses from time to time?

A. He would have a good day and a bad day; after all, Mr. Mershon, he wasn't a robust man.

Q. Isn't it true that he carried more liquor than your schedule provided for him the week before they went down in the Keys?

A. Not that I know of.

Q. You don't recall that?

362 A. No.

Q. You do know that the guests called off the trip and wouldn't go with him?

A. No, I don't know that.

Q. I thought you said that.

A. No, you told me that.

Q. Had you ever attended Mrs. Just or Miss Grunow before you were called this time?

A. Never saw them; I had met them on the boat just before, and that is all.

Q. Now you talked to Jack McKay about taking this trip, and Jack said that he would take care of Yeiser's drinking; I believe you stated that on direct examination?

A. I don't remember making that statement.

Q. Well is it true or not; did you talk to Jack McKay about it?

A. Yes.

Q. Did you suggest that he call off this trip?

A. I certainly did.

Q. What did he say?

A. I went to the captain of the boat to see about it.

Q. I am asking you what did Jack McKay say?

A. Well, he intimated that he had the trip planned and that they were going to make the trip. Yeiser wouldn't have called that trip off if it had broken his back, as far as he was concerned.

Q. Tell us what McKay said.

363 A. He wasn't in favor of calling it off; that's all.

Q. Didn't McKay state that he would look after Yeiser and see that he was all right?

A. I don't remember if he did; he may have made such statements; if so, he did a poor job of it.

Q. Do you deny that he made such a statement?

A. I don't say either way; I don't remember.

Q. What was the relationship between Jack McKay and Henry Yeiser as you observed it during the two months you knew Mr. Yeiser; were they friendly?

A. Yes, they were friendly.

Q. Were they pretty close friends?

A. I don't know about that; they were friendly. As I understand it, Jack McKay was a local representative or something of the kind of Yeiser.

Q. Did you see McKay aboard the boat quite often?

A. I don't know how many occasions I saw him; I saw him relatively a moderate number of times.

Q. You don't mean every time you went aboard, but you did see him there two or three times?

A. Every three or four days, something like that, I would see him down there, but he wasn't there any more than three or four minutes at a time; he would drop in and out.

Q. Do you state positively that the Friendship II made no trips down in the Keys for the period of two months that you attended Mr. Yeiser?

364 A. I did not make any positive statement of that kind at all; I don't know if the boat left or pulled anchor; I knew that the boat pulled anchor because it moved out, but as far as making the trip I cannot say definitely that it made a trip or didn't make a trip.

Q. Don't you know that it could have made twenty trips?



A. No, not twenty trips.

Q. Could it have made five trips?

A. No, it couldn't have made five trips or two or three trips, or anything of the kind; it may have shoved off and gone out for a half a day or something like that that I don't recall to memory, but as far as making trips, they were not gone from under my care during that time, sir.

Q. You stated on your direct examination that when you got to the boat on the morning you found these young ladies between eight and nine o'clock,—can you make that more definite by referring to the record which you made on that date?

A. Well, I can explain it this way; this says, "Called to boat at 8:00 A. M." Mr. Mershon, I had gotten up, as I stated, after a heavy night before. As far as looking at the time, I didn't look at the time; I don't remember exactly the time, but I know it was early when I got up and around.

Q. If it were important to you to know the time and you had to fix the time, you would fix the time as 8:00 A. M.?

A. If it were important to me to set the time, that would be a different matter, but that wasn't anything of any particular importance.

Q. Is there any other inconsistency or error  
365 in this record?

A. That is not inconsistent at all.

Q. You now say it is between eight and nine?

A. Probably between eight and nine o'clock.

Q. It could have been nine o'clock?

A. It could have been nearer nine than eight.

Q. In that event, this "8:00 A. M." on this record would not be correct?

A. That would be a fallacy in that case, sir.

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The Court:

You may proceed.

(By Mr. Mershon):

Q. Dr. Howell, when you came into the hospital on the night of March 2nd and found Dr. Harris there with Mrs. Just, did you note the records of the case and observe that Dr. Foxworthy had given some orders?

A. I didn't note the records of the case but I found that he had given some orders; by the presence of the oxygen tent I figured that.

Q. You had not ordered it?

A. No.

Q. You had given the same mixture during the morning but you had discontinued it?

A. I had given it relatively throughout the morning but it was discontinued at such time as thought advisable.

Q. Did you order it immediately removed when you came in and found it being used?

A. No, I didn't order it immediately removed.

Q. Did you call Dr. Foxworthy and ask him what he was doing on the case?

A. It wasn't my place to call him; I didn't call him; he was supposed to call me, as I was the one there first.

Q. You didn't talk to him that evening at all?

A. No, sir.

Q. Either by his call to you or yours to him?

A. No, sir.

Q. Did you then discuss with Dr. Harris the matter of Dr. Foxworthy being on the case and giving orders?

A. Yes.

Q. Did Dr. Harris tell you that he had talked with Dr. Foxworthy that evening?

A. No, he didn't.

Q. You did not know then that Dr. Harris may have been in communication with Dr. Foxworthy?

A. No.

Q. I believe you said on direct examination that it was a case of two heads being better than one?

A. That is true, too, sir. You asked me why I called Dr. Harris. I asked the family—at least I asked Mr. McKay if he thought it would be better, if they would feel better about it if I called in someone, and I told him I would be glad to do it, because I welcomed consultation of a man that I feel is my equal or better.

Q. So you did regard the case as serious enough to justify calling in one of the topnotch internal medicine men to consult with you?

A. I offer anyone that as his privilege, and I feel that that would be another opinion, that they might probably be shaky about me because they didn't know me and—

Q. I understood you to say on your direct examination that you called him to discuss it with you because you thought two heads were better than one.

A. I said I talked with the family—when I say “family” I mean I talked with McKay, and that was the outcome of that. I felt that two heads were better than one, yes; I always do.

Q. You were willing to accede to the suggestions that Dr. Harris might make, were you?

A. If they met with my approval in handling the case, or we would discuss it out or thresh it out.

Q. You did as a matter of fact get together on it?

A. Yes, that is true, surely.

Q. Now don't you know as a matter of fact that after Dr. Harris on that evening gave this methylene blue which he counteracted with the injections of caffeine sodium benzoate?

Mr. Mehrtens:

If Your Honor please, I want to object to counsel for the petitioner making motions to the witness by shaking his head before counsel for the claimants has a chance

to interpose his full interrogatory. He may be doing it unconsciously.

Mr. Parmer:

Yes, I want to say that I did, that I shook my head this way (indicating), but I did it because my friend is saying "caffeine sodium benzoate", whereas the chart shows that adrenalin was given. I was merely trying to attract his attention.

Mr. Mershon:

They are both on here, and that's what I was trying to get at.

(By Mr. Mershon):

Q. "She was given ten m.m. adrenaline & 5 gr. caffeine sodium benzoate along with CO<sub>2</sub> (carbon dioxide) & CO<sub>2</sub> inhalations." After Dr. Harris had ordered that, after he had done that, you know as  
369 a fact that he ordered her put back under the oxygen tent; don't you?

A. I don't think so; I don't know whether he did or not, but it was certainly something that would not hurt her; it is good for anybody.

Q. So you and Dr. Harris both approved what Dr. Foxworthy had ordered done for her that afternoon?

A. I don't know of anything else. As far as the oxygen tent is concerned it wasn't necessary but it didn't hurt her; it just caused her to pay fifteen dollars a day extra, that's all.

Q. Then you approved Dr. Harris' running up that cost of fifteen dollars a day which Dr. Foxworthy brought out—

A. I might approve or disapprove.

Q. Kind of like your promise; you had no—

A. No, it wasn't like the promise at all; I made no promise; just because one man said I made a promise is no sign that I made it.

Q. In other words, unless you admit them you say you didn't make them, and you now say that you neither approved nor disapproved use of the oxygen tent?

A. That is true.

Q. I believe you said that you yourself discharged Mrs. Just from the hospital on March 6th?

A. I don't know the date, but it was the day before she left.

Q. The day before she left?

A. Yes.

Q. Did you make any record of that discharge?  
370

A. I think I did, sir.

Q. What kind of a record would you make?

A. A written record.

Q. In the hospital records?

A. Yes, sir.

Q. Would you also—

A. We also issue those orders; I wouldn't swear to that being a written record, but I did discharge her the day before, but whether that was a written or verbal order I don't know. I might say this for your information that those records are copy records there: I didn't write that order sheet there at all; that is a transcript record in someone else's handwriting. I wrote in the book.

Q. I understand that but in due course this should contain a copy of every order that you wrote in the book?

A. It should contain it; yes.

Q. It should be highly irregular if you wrote it in the book and it is not copied here?

A. Yes.

Q. I will ask you to examine this record, which is Claimants' Exhibit 9 and all of its pages, and state whether or not it shows any discharge by you of Mrs. Just on March 6th or another date?



371 A. It doesn't show any record of where I discharged her; it is marked that she was discharged by Dr. Foxworthy. May I state that this case wasn't Dr. Foxworthy's case in the beginning and he couldn't discharge her if she wasn't his patient.

Q. But the record as a matter of fact shows that he did?

A. Yes; he was on the case.

Q. And the hospital recognized his authority on the case?

A. The nurse on the case did. You can verify that by Sister Josephine; as we had some words regarding him coming on.

Q. Isn't it a fact that the records of the hospital don't show that you discharged her?

A. I don't know whether the records do or not, but that record there does not.

Q. This record shows that Dr. Foxworthy discharged her on March 7th and failed to show that you ever discharged her.

A. That is right.

Q. This record of the St. Francis Hospital also shows that Dr. Foxworthy was calling on her right along as you were calling on her throughout the entire period?

A. Yes.

Q. Isn't it a fact that in this discussion you had that Dr. Foxworthy took the position that he was not only employed on the case but was in charge of the case?

A. If so, Mr. Mereson, he was suffering from a delusion.

Q. Did he have that delusion?

A. If so he didn't intimate it to me.

Q. He didn't tell you that he was employed by the family?

A. No, he didn't.

Q. Employed by the family to attend Mrs. Just?

A. No.

372 Q. In this discussion you had with him he did not say that he was employed on Mrs. Just case by the family?

A. No, sir; he merely told me that he was a friend of the family.

Q. I believe you stated that after Mrs. Just was discharged, that is to say three or four days afterwards, you called where you had been told to call, is that correct?

A. Yes, sir.

Q. Who had told you to call on Mrs. Just after she left the hospital?

A. I had received her address from Mrs. Bischoff.

Q. When did you receive that?

A. Before she departed from the hospital.

Q. How long before?

A. I don't know; probably a day or so.

Q. Before you discharged her?

A. Yes.

Q. Not at the time you discharged her?

A. Not at the time, no.

Q. Did Mrs. Bischoff request you, after you had discharged Mrs. Just, to continue to call on Mrs. Just?

A. A request was not necessary; I considered that it was my privilege to call on that patient at home, so long as I felt she needed my services.

Q. Then you felt that she needed your services three or four days after you had discharged her from the hospital?

373 A. Not particularly, sir; I merely went to check up to see that she was doing all right, and that's all. That was my final call.

Q. I don't want to be unfair to you, but I want to get this straight, doctor: Are we to understand that you called on Mrs. Just three or four days after she left the hospital for the express purpose of seeing her and

without any necessity for rendering medical services to her?

A. I don't know what you are driving at. But, as I stated, I considered it my privilege, and any other doctor considers it his privilege to visit a patient after discharging her from the hospital.

Q. I am driving at this, doctor: Isn't it a fact that when you say you discharged her from the hospital that you then realized that her condition was such that you should follow her up and check up on her and see how she was getting along?

A. No, I merely wanted to terminate the case; that is all I wanted to do, just to be sure that she was all right, and I felt in my mind that she was all right, and I wanted to be sure, and that was that.

Q. Then you had not terminated the case when you discharged her from the hospital?

A. Virtually I had.

Q. Where did you find this address, this Villa, that you say had been given to you as the address where Mrs. Just was living with her aunt, Mrs. Bischoff?

A. Where did I find it?

374 Q. Yes.

A. I didn't find it; it was given to me.

Q. We will not quibble about language; doctor; where did you find the place located?

A. Up on the beach, way up on the beach, sir.

Q. Well, was it beyond the St. Francis Hospital, north of St. Francis Hospital?

A. That, I cannot say. I can go to the place, but as far as giving you the exact location I don't know that. I will be frank with you; I cannot tell you the exact location, but I can take you to the place, if you care to go. Unfortunately, sir, I do not try to remember addresses.

Q. How far was it from St. Francis Hospital to the place where Mrs. Just and her aunt and Miss Grunow were living?

A. I don't know, because I didn't drive from the hospital over there.

Q. Don't you have some idea that it is not very far?

A. No. If you told me it was probably a couple miles or something like that, that would be all right, but if you told me it was a hundred yards, then I would say you are wrong. If you say it is two or three miles, that is all right.

Q. If I said it was about a half mile, would that be right or wrong?

A. I cannot say, because I don't know the Beach that well.

Q. Now as a matter of fact, doctor, Mrs. Bischoff, the aunt, was over at the hospital every day with Mrs. Just?

A. As far as I know.

Q. It did serve her convenience to have Mrs. 375 Just on the Beach rather than across the Bay over here at the Jackson Memorial Hospital, didn't it?

A. I don't know that the matter of convenience to the family is given any consideration when you are figuring on the well-being of your patient.

Q. Did this patient's well-being suffer from having gone to the St. Francis Hospital rather than to the Jackson Memorial Hospital?

A. I can't say that it did.

Q. That didn't enter into it?

A. Not with me.

Q. But with the patient it made no difference, her well-being was still taken care of; her well-being could be taken care of in one place just as well as another, or the other?

A. It may have and it may not have.

Q. Please answer.

A. That is what I had anticipated, not what actually happened; to me it was a matter of some convenience.

Q. Can you say that it did?

A. No, sir.

Q. Did you tell Mr. McKay or the members of the family that it would make any difference?

A. No.

Q. So it finally resolved itself into a question of convenience having Mrs. Just up near where her aunt was living on the Beach?

A. Yes, but this is the first I heard of that.

Q. Did you know that she lived on the Beach?

A. I didn't know where she lived at that time; I had no more idea than a man in the moon.

Q. Mr. McKay didn't express that thought to you?

A. No.

Q. Mr. McKay directed to have her taken to the St. Francis?

A. He suggested it; he thought it was better and it would be away from the newspaper reporters and the like.

Q. In fact, it was close to where she was living, wasn't it?

A. I guess so.

Q. Now on this evening when you called at Mrs. Bischoff's to see Mrs. Just, doctor, you didn't see her, did you?

A. No, I didn't.

Q. And you said that you dropped in just to see how she was getting along?

A. That is right.

Q. You didn't see Miss Grunow?

A. No.

Q. You don't know whether Miss Grunow had been to a cocktail party or whether she had been—

A. I only quoted, sir, what I was told; that the lady was retired; that she had been to a cocktail party and had retired; that she was indisposed.



Q. "Indisposed", what do you mean by that?

A. That she had retired, I mean, and not receiving visitors.

Q. Let's come back to the chart in your handwriting, doctor. Before looking at the chart I will ask you what is the medical definition of the term "aphasia", as you knew it and as it is generally understood?

A. The definition of aphasia, sir, is inability to express thought in words; there are various types and kinds of aphasia, either by word, sign or writing, and inability to express those things.

Q. To what is that inability related; is it on the central nervous system?

A. Yes.

Q. It is brought about by some abnormal condition affecting the central nervous system, is it not?

A. It may and it may not be.

Q. It has to be since it depends on the central nervous system.

A. Did you ever hear of a hysterical aphasia?

Q. No.

A. There is such a thing.

Q. Is that related to the nervous system?

A. Hysteria?

Q. Yes.

A. Yes, it is and it is not.

Q. In the layman's language it means failure to control your nerves?

A. Yes, if you want to put it in the layman's language.

Q. In your handwriting on page 9-C of Claimants' Exhibit 9 is the entry, entered as of two o'clock P. M., on March 3, 1936, the day after Mrs. Just entered the hospital: "Patient seen. Waked out of sound sleep. Color good after removal from oxygen tent." Was she still in the oxygen tent on the 3rd?

A. Yes, sir.

Q. Following that are the words: "Patient mentally apparently quite clear; mind active and alert; however, there is a definite aphasia present".

A. That is a badly put word, if you want to dwell on that. I refer to what you see in the last line there, as I tried to explain the thing there; I didn't go into detail.

Q. "She is quite talkative and pleasant; does not recall happenings of yesterday".

A. That is where my aphasia referred.

Q. Doesn't that last line make a complete thought or statement within itself: "She is talkative and pleasant; does not recall happening of yesterday". Doesn't that convey exactly what you meant to say?

A. Yes, sure.

Q. So it was not necessary to have used the word "aphasia"?

A. No.

Q. Do you now say that the word "aphasia", with its technical and its medical significance as used by you in that chart over your signature, is surplusage and didn't belong in there at all?

A. The word "aphasia" is not essential in there at all.

Q. Is it untrue?

A. It is not untrue; it is just an honest mistake.

Q. It is another one of these fallacies we have been talking about?

A. It is one of those hurried writings.

Q. Now as a matter of fact she was having difficulty in getting her words together to express her thoughts?

A. Not when she wanted to talk to me.

Q. What?

A. Not when she wanted to talk to me. She was pugilistic, or she resented my presence for a couple of days there; that is all. Read the rest of the record there and you will find it.

Q. Of course the word "pugilistic" doesn't have the same definite meaning that aphasia does?

A. That is right.

Q. There is no question about the medical significance of the term "aphasia" as understood by practicing physicians?

A. Just how do you mean that; in other words, there is no question as to what it means?

Q. Yes.

A. Surely not.

Q. Is there any question but that a doctor and physician or the staff of the hospital in reading that chart would interpret it over your signature to state positively and definitely that this lady at that time, at two P. M., on March 3rd, 1936, had a distinct difficulty in talking?

A. It still would mean aphasia.

Q. All right; what does aphasia mean?

A. It means an inability to express thought by speech, writing or sign; that is all it means.

Q. So by reading that chart anyone who knew  
380 the definition of aphasia would understand that on that dated, after seeing this patient, you were stating that she had an inability to express her thoughts; is that true?

A. I doubt it very seriously if they read the line above, where I said she was very pleasant and very talkative, sir; I think we are quibbling over a word.

Q. If so, doctor, I would like to be enlightened, and I know that the Court would, too.

A. All right.

Q. I am asking you if there is anything about these words, "she is talkative and pleasant; does not recall happenings of yesterday", that would imply that while talkative and pleasant that she was not having trouble in expressing her thoughts?

A. There isn't anything in that that would imply that she wasn't having trouble.

Q. The use of the word "aphasia" preceding it, assuming that that was not intended to imply the thought—

A. I meant of the day before, however, that is a minor detail, sir.

Q. In other words, you say your report is inaccurate and untrue?

A. No, I don't say my report is inaccurate and untrue.

Q. You mean it is inexact?

A. I say there are features of it that are inexact.

Q. I believe you just stated that her attitude was pugilistic on this occasion?

A. Well, that word was used for lack of a  
381 better descriptive adjective to use, sir; I might say a better term would be to say that she was apparently resentful of my presence for a couple of days, and my conclusion was that it was because Dr. Foxworthy had talked with her.

Mr. Mayne:

We ask that it be stricken out.

Mr. Parmer:

I will consent to that.

The Court:

The statement will be stricken.

(By Mr. Mershon):

Q. Doctor, isn't your statement that her attitude was pugilistic at variance with your written statement made at the time to the effect that she was quite talkative and pleasant?

A. That was a day or so afterwards.

Q. When did she become pugilistic?

A. A day or so later.

Q. A day or so after—



A. It was during her stay there in the hospital that she was resentful. Let's put it that way.

Q. Did you make a note of that attitude?

A. No.

Q. Nevertheless you say that attitude existed?

A. Yes, sir.

Q. If you didn't make a note of that then the chart is defective and incomplete, in failing to record that important symptom?

A. If I went in there and put down all of my  
382 positive and negative findings you would have a volume to read. We merely put down the high spots.

Q. These are your well considered crystallized high spots culled from all of your observations?

A. Probably they were very hurriedly written; in other words, hurriedly written to convey the meaning; see?

Q. To convey a picture of the patient's condition?

A. That is right.

Q. You stated on your direct examination, doctor, if I recall correctly, that you ordered discontinuance of the use of sedatives for Mrs. Just, is that correct?

A. I don't say I ordered it; I recommended it; it is on the chart there.

Q. I understood you to say that there was a difference of opinion between you and Dr. Foxworthy on that point, and that you had talked about this situation.

A. I don't think I made a statement like that, nor did I discuss the merits or otherwise of this case with Dr. Foxworthy from a chronological standpoint. I didn't discuss whether she needed sedatives or not. I went into the hospital and found that she had sedatives ordered there, and I wanted to get them out.

Q. Then you made that order here?

A. I say again that I don't think any such order appears, but I can show you a writing to that effect.



Q. Show us.

A. Here it is: "3-5-36—Patient sleeping upon my visit—apparently progressing nicely. I feel that all sedatives should be discontinued and give the  
383 mental condition a chance to clear. Sedatives should be used only if nerve condition necessitates same".

Q. At the time you wrote that did you regard her nervous condition as requiring sedatives?

A. No. Any of us may or may not need a sedative if we are under strain at night to get to sleep. I didn't feel that her condition warranted it, but I gave them the privilege of using it if necessary, and we of course leave things of that kind more or less to the nurse.

Q. Do you recall whether you later found it necessary to order sedatives for her because of her nervous condition?

A. I don't recall whether I did or not.

Q. Nevertheless, doctor, didn't you state on your direct examination that on the 6th of March you ordered neurocene for the patient?

A. I don't know, sir; I can look at that and tell you, sir, if you don't mind. On the 4th day of March neurocene was ordered.

Mr. Mayne:

And also on the 6th.

The Witness:

It was ordered on the 4th, the only order that was issued for it, and I gave her what we know as P. R. N., meaning "when absolutely necessary for nervousness".

Mr. Parmer:

You mean, doctor, that "P. R. N." means "when absolutely necessary"?

The Witness:

Yes. I can't give you the Latin term for it, however.

384 (By Mr. Mershon):

Q. If you did state on your direct examination that on March 6th and March 4th you prescribed neurocene at that time for rest, you were mistaken when you undertook to say that you made such a prescription on March 6th—

A. No, I said I ordered it on the 4th.

Q. Did you order it on the 6th?

A. I did not.

Q. All right; that will suffice for the record. Then your so-called order regarding sedatives was nothing more than leaving it to the nurses to give them to her if she needed them?

A. You put a very loose terminology on that, sir.

Q. All right.

A. No, it is not that way. We leave a thing like that up to the judgment of a nurse who is well trained with definite instructions regarding it. We don't just say, "Give it to them if they want to have it". They must have a definite reason for giving anything that is left that way.

Q. If the condition warrants it.

A. If the condition absolutely warrants, yes.

Q. When you were taking Mrs. Just to the hospital in the ambulance, at which time you say she vomited, what was it she vomited from her stomach?

A. Just the stomach content.

Q. Was it a frothy mucous?

A. It looked like portions of undigested food.

Q. You mean as late as 2:45 when you were  
385 going to the hospital?

A. Yes, it looked like portions of undigested food; the stomach content, as we say.

Q. Had she been vomiting more or less regularly from eight o'clock in the morning?

A. Not regularly but at intervals.

Q. Did you see any frothy mucous about her mouth?

A. All stomach content carries a pretty good quantity of mucous in it.

Q. And froth?

A. Not froth but mucous.

Q. Did you observe any froth?

A. No, I didn't.

Q. Can you recall or say there wasn't any?

A. Yes, I can.

Q. You say there was no froth?

A. That is right; not in the form that you are putting it; you asked me if I saw any froth coming out of the mouth.

Q. I am also asking you if you saw any bubbly or frothy content that came out of her stomach?

A. All stomach content more or less is bubbly; all mucous carries particles of undigested food.

Q. Doctor, don't you eventually, when you haven't had anything to eat and start vomiting, exhaust all of your stomach matter?

A. No, you can vomit fecal matter.

Q. Did you observe any of that in this vomiting?

A. No, I didn't observe any of that fecal matter, that is digested content.

386 Q. When you say that the nurses got off the case just before the trip was taken to the Keys, do you mean that they resigned permanently or that they just quit for the period that he was on the trip?

A. It was permanent as far as they were concerned.

Q. Was one of those nurses the nurse that came aboard the boat the morning she got in from the trip with these sick ladies aboard?

A. Yes.

Q. That was Miss Norwood?

A. Yes.

Q. Did the other nurse come aboard?

A. I think she did; yes, I know she did.

Q. I believe you say that not only had Mr. Yeiser requested both the nurses and you to accompany them on the trip, but had actually offered to pay them and pay you for doing so?

A. That is right.

Q. At the same time he extended you the invitation to be his—you and the nurses—guest along with the other guests on the trip?

A. No; we were just to be one of the party, just like any of the rest of them. As long as I am working for a man I consider myself part of the help.

Q. Did he extend you an invitation to be a part of the help or an invitation to be his guest?

A. He asked me to accompany him on the  
387 trip, and I was to be compensated for my services.

Q. And you were to be his guest on the trip at the same time?

A. Well, you can call it a guest or you can say "personal physician" or whatever you want to. I was to be paid, sir, and I was to be in the party or a part of the party.

Q. And to look after them if anything went wrong?

A. Absolutely, or anyone else who was on the boat.

Q. And the young ladies, who were the nurses, were also extended an invitation?

A. Yes.

Q. And you were to look after him if anything went wrong or needed looking after?

A. Yes, sir.

Q. So there was no apparent desire or intention on the part of Mr. Yeiser to conceal anything which might happen on that trip, or to cover up what he apparently intended to be a trip for his friends, was there?



A. No, sir.

Q. Do you say that is right?

A. That is right.

Q. Doctor, have you been paid for the services you rendered to Miss Grunow and Mrs. Just?

A. I have.

Q. Who paid your bill?

A. I can't tell you the name; it was some insurance company.

Q. Was the bill rendered to the Yeiser  
388 estate?

A. My first bill was rendered to Mrs. Just and was mailed to the Beach, and then in turn I mailed a bill to the insurance company.

Mr. Mershon:

I want to say to counsel that this is not a jury case. That is not the answer I intended to elicit.

Mr. Parmer:

Your Honor, I want you to know that I am defending for the insurance company; that is the reason I am here.

#### Re-Direct Examination.

By Mr. Parmer:

Q. Dr. Howell, when you were being questioned by Mr. Mershon with regard to your refusal or neglect to co-operate in giving a written statement, you gave certain testimony which indicated that there was a distinction in your mind between talking to Mrs. Just, the person whom you treated, and talking to lawyers. I want to know whether you have such a distinction in your mind?

A. The only person or company or anyone that asked me in any way regarding the thing has been some legal



firm in St. Louis; and, as Mr. Mehrtens says, he talked with me. I am sorry I didn't remember it, though. As far as having any feeling regarding one side or the other, I can only say, as I said before, that I am sorry that I got mixed up with it in any way, shape or form; however, I saw in the beginning the way things linked up, and I didn't want to be messed up on the side where I knew was wrong.

Q. What do you mean by that?

389 A. Well, just everything that happened at the hospital and so on and so forth, and the suggestion Dr. Foxworthy made regarding the suit and so on and so forth. I had not the slightest idea of this case or that I would be mixed up in any case at all. Had I known the trouble that was coming I probably would have made the records a little different. Those records went to the file just as they actually were, and I talked with the aunt and she assured me the same thing.

Q. Well now it so happens, Dr. Howell, that you did—I believe you said in your testimony—give a deposition for the counsel for this boat and, as we have already said, the insurance company—

Mr. Mershon:

We object to that premise of the question. I am sure counsel is mistaken. I don't think it is true in point or fact that he gave a deposition. I presume that what counsel means is a written statement.

Mr. Parmer:

By deposition I mean that he made a statement and that it is in question and answer form.

Mr. Mershon:

You mean orally, without a record being made?

Mr. Parmer:

It is not a deposition taken de bene esse pursuant to the statutes of the United States, but it is in the form of a deposition, in question and—

Mr. Mershon:

Counsel's statement presupposes something which the witness has said, something that is not true; it presupposes that the witness gave a written statement, while the witness has testified that he never gave a written statement to Mr. Mehrtens or to counsel representing Mrs. Just.

390 Mr. Parmer:

I understood that the witness said in his testimony that he had given a deposition.

The Witness:

May I say something?

Mr. Parmer:

Just a moment.

Mr. Mehrtens:

Do you mean a written statement or oral statement?

The Witness:

Oral.

(By Mr. Parmer):

Q. In that statement did you inform counsel for the defendants with regard to what you knew about the case?

A. Yes, I told them just exactly what I knew, and that was that.

Q. What I want you to do is to explain to the Court why you talked it over with counsel for the defendants

and you wouldn't talk it over with counsel for the plaintiff. I want you to be perfectly frank and just tell the whole story.

Mr. Mehrtens:

If Your Honor please, I want you to warn the witness not to give you his opinions or conclusions. I don't want him to give any conclusions about the merits of the lawsuit or anything of that sort.

Mr. Parmer:

I hope he won't.

The Court:

I think the witness understands the question.

A. Gentlemen, and Your Honor, I thought that I had made myself clear, because I knew of the fact, as I stated before, the way the thing was set up, how it existed, and I didn't care to be mixed up with that side of the case; that is all there is to it.

Q. And you preferred to be mixed up with the other side?

A. If I had to be mixed up with any case at all, Mr. Parmer.

Q. Well, now, Dr. Howell, your attention was  
391 called here to a certain report concerning a blood-count. It seems to be on page "E" of this Exhibit 9. Is that the page?

A. Yes.

Q. Well, now, Dr. Howell, was that blood-count made by you or by someone else?

A. That was made by the hospital laboratory.

Q. I think you said that such a blood-count would show whether there was a normal amount of hemoglobin in it.

A. Yes, sir.

Q. And what does it show?

A. It shows the hemoglobin as 87%.

Q. Is that normal?

A. Well it is certainly normal for any female, and it is quite normal for a male; in other words, the hemoglobin runs from 85 to 100%, and we consider that normal.

Q. What was the date that was taken?

A. That was on 3-5-36.

Q. March 5th?

A. Yes, sir. The red count is also normal; it is practically 4,000,000. That is a bit higher than usual for a female.

Q. Now can you tell us, Dr. Howell—you might as well keep that record—when it was that you first got in touch with Dr. Harris on March 2nd?

A. When it was I first got in touch with him?

Q. Yes, if you can remember.

392 A. I am sorry, but I can't recall definitely what hour of the afternoon or what time it was I got in touch with him.

Q. What time was it when you got to the hospital and found out that the nurses had already treated Mrs. Just by an injection?

A. That was probably somewhere around nine o'clock, somewhere in that range; I don't know just what hour it happened.

Q. After you found that out did you have a discussion with Dr. Harris with regard to the case?

A. Yes, sir.

Q. And you told him your views?

A. Yes, sir.

Q. Did you tell him your views with regard to the possibility of alcoholism?

A. Yes, sir.

Q. And with regard to what had happened on the boat, with regard to suggestions of carbon monoxide poisoning?



A. Yes, sir.

Q. Now let me see this report of Dr. Harris here. Is this what Dr. Harris wrote down after you had had your talk with him:

"Note: Physical examination is essentially negative. In view of the history it seems likely that the patient had a case of carbon monoxide poisoning. There is undoubtedly a functional element present."

Mr. Mayne:

Just a minute. We object to that unless this witness knows that Dr. Harris wrote that statement. The witness has already said he couldn't recognize Dr. Harris' statement.

393 The Witness:

May I say, sir, that I do know that he did his writing on the chart; I can say that for you.

Mr. Mayne:

Did you see him write it?

The Witness:

I didn't see him write that. I know that he did his writing on the chart as I was leaving the hospital.

Mr. Mayne:

You didn't see him write it?

The Witness:

No, I couldn't swear that he wrote it.

Mr. Mayne:

You don't know if this is his writing?



The Witness:

No, sir.

Mr. Mayne:

Someone else may have written that?

The Witness:

Sure, however, it is initialed by him.

Mr. Mayne:

Mr. Palmer's question calls for a conclusion of the witness.

Mr. Parmer:

I will withdraw the question, of course.

(By Mr. Parmer):

Q. Well, doctor, I am going to ask you to assume for the moment that Dr. Harris did write this in the record as it appears on March 2, 1936, as follows: "Note: Physical examination is essentially negative. In view of the history it seems likely that the patient had a case of carbon monoxide poisoning. There is undoubtedly a functional element present." Tell me, sir, is that a diagnosis of carbon monoxide poisoning?

Mr. Mershon:

We object to the question on two grounds: First, it assumes something that has not been proven—

Mr. Parmer:

What is that?

Mr. Mershon:

That Dr. Harris wrote that on the chart.

Mr. Parmer:

I thought we stipulated on that at the beginning.

394 Mr. Mershon:

I will withdraw the objection, but will object on the further ground that it calls for a conclusion of the witness as to whether or not that is the diagnosis. That is a matter for the Court to determine. The instrument speaks for itself.

Mr. Parmer:

As a medical man he can tell whether a doctor is making a diagnosis or not, or whether he is giving an opinion based on previous history.

Mr. Mayne:

He is asking Dr. Howell to state what was in the mind of Dr. Harris when he wrote that.

Mr. Parmer:

No, I beg to differ with you. I am asking him to state what a statement like this on a hospital record means to a reasonable doctor who knows his business.

Mr. Mayne:

Dr. Harris will be able to explain what he had in mind when he wrote it, but you are asking this man to say what was in the mind of Dr. Harris.

Mr. Parmer:

Mr. Mershon was asking the doctor about this very thing.

The Court:

The objection is overruled. Let him answer the question.

A. What is the question.

Q. I want to know whether that note which I asked you to assume was made by Dr. Harris, constitute a diagnosis of carbon monoxide poisoning?

A. No, sir, I would not consider it so.

Q. Will you explain what this means, doctor, these words: "There is undoubtedly a functional element present." What does that mean to a doctor  
395 as explained in terms that the layman can understand?

A. I am sorry to say that I could not tell you what Dr. Harris might have had in mind when he wrote that "functional element" there.

Q. It doesn't mean anything to you?

A. It doesn't mean anything to me, sir.

Q. Now in answer to one of Mr. Mershon's questions I think that you agreed that Dr. Harris concurred in your diagnosis; do you remember that?

A. I don't know just—

Q. Do you remember that in answer to one of Mr. Mershon's questions you said that Dr. Harris had concurred in your diagnosis?

A. Yes. I mean that he did to me. As I said, I don't know what is written there and I don't care.

Q. What I want to know is what you meant by that when you said that Dr. Harris concurred in your diagnosis?

A. He agreed that my interpretation of the case was in all probability right, and he saw what I had given and he thought that it was very good.

Q. When you say that you were right do you refer to the alcoholic conditions about which you have already testified?

A. He knew of that also; I discussed that very much with him.

Q. In the morning on the boat while you were looking after Mrs. Just on how many occasions do you  
396 know that she was given oxygen and CO<sub>2</sub>?

A. Well, I can only swear to that time that I gave it to her; I gave it to both of them personally, and the giving of it at that time wasn't over five minutes.

Q. What I want to know is do you know of any other occasion on the ship when they were given this oxygen besides the time that you personally administered it?

A. I know it was given by the nurse.

Q. Later on?

A. Yes.

Q. Do you know how many times in all?

A. No, sir.

Q. Doctor, you have been asked certain questions with regard to your use of the word "aphasia" as appears in this record. Now one of the questions that was put you used the words "Difficulty in expressing your thought" as a synonym for the word "aphasia". Now will you tell in your opinion what is the real technical meaning of that word?

A. A real aphasia is inability to speak a word; a writing aphasia is an inability to write and so on; as I said before, here are two or three different forms of aphasia, sir.

Q. Is the emphasis on "inability"?

A. Inability to express your thoughts.

Q. Does it imply in any way an inability to express it with difficulty?

A. No; it doesn't.

397 The Court:

I always labored under the impression that aphasia was loss of memory. I suppose I am wrong.

The Witness:

I refer you to Gould's medical dictionary, sir.

(By Mr. Parmer):

Q. Doctor, I note that you have in your record of findings on page 9-A of this exhibit that Mrs. Just had a moderate cyanosis.

A. Yes, sir.



Q. Was that around the lips?

A. Yes, in the lips and around the mouth.

Q. Can you tell us whether such a condition can be caused by the excessive use of alcohol to the extent where a person becomes overcome by its use?

A. Yes, sir. If a person passes out drunk they fail to airate their lungs and that causes a cyanosis.

Q. What is the color which is produced when one's blood becomes combined with carbon monoxide gas; what is the color of the blood?

A. It is cherry red.

Q. Do you mean by that a brighter red than the ordinary color of blood?

A. Yes, it is a brighter red. The normal arterial blood is red and the venous blood is blue, and the description of your carbon monoxide with hemoglobin is cherry red in color.

Q. And when persons have such carbon monoxide poisoning and that is combined with the hemoglobin of the blood, does that show 'cherry red in color?

A. Yes, sir.

398 Mr. Mershon:

Just a few questions.

#### Re-Cross Examination.

By Mr. Mershon:

Q. Dr. Howell, do you mean to tell the Court that these ladies, Mrs. Just and Miss Grunow, at the time you saw them on March 2nd, 1936, were not suffering from carbon monoxide poisoning at all?

A. Mr. Mershon, I think the alcoholism had the biggest part of the deal.

Q. The biggest part?

A. Yes.

Q. What do you think had the smallest part?



A. Mr. Mershon, you and I might walk through a garage and we will get a carbon monoxide poisoning, so to speak, due to the condensation from the engines in the garage, so if you say "slight", maybe yes and maybe no."

Q. Well, do you mean to say that they did not have any carbon monoxide poisoning at all?

A. I don't say that. I say maybe yes and maybe not.

Q. You won't commit yourself one way or the other?

A. I beg your pardon. It is not a question of whether I want to commit myself or not. I merely say that they may or may not have had it, but I felt that the other was the thing that was most significant.

Q. Was there the slightest possibility in your mind when you saw them for the first time that they may have had carbon monoxide poisoning?

399 A. Oh, they may have; they may have had a lot of other things.

Q. Did it occur to you that they might have in view of the case history they gave you?

A. That was the thing I had in mind from the time I went on the boat.

Q. Why didn't you make a blood test to find out?

A. Because I didn't think it was necessary; they got along too well; they got along well; they were not sick individuals.

Q. Do you mean to say they got along well with what you thought they had?

A. I was never for a minute leary that either of the women wouldn't come out of that condition.

Q. And what condition was it, alcoholism or carbon monoxide poisoning?

A. I felt they were both suffering from alcoholism.

Q. Did you feel that they were not suffering from carbon monoxide poisoning?

A. They may or may not have had some carbon monoxide poisoning; I won't say they didn't; but I do feel that the other was the major thing.

Q. But in view of that history you made no effort to find out whether they had carbon monoxide poisoning?

A. No, sir. A carbon monoxide poisoning patient when they get into normal atmosphere will clear up immediately.

400 There is one of two things they are going to do; if they get enough of it they are going to die, and they are going to die right quick.

Q. So you figured there at that point that they would get well of the carbon monoxide poisoning?

A. I didn't figure much that they had it; I figured that they would get well.

Q. If they did have it?

A. Irrespective of what they had I figured they would get well.

Q. With respect to the alcoholism, doctor, you figured they would get over it?

A. Yes, just give them a little time and they would sober up, yes, sir.

Q. In spite of all of that you plainly falsified the records of the case in the hospital?

A. If you will have it that way, sir.

Q. Do you further say that Dr. Harris knowingly concurring in your view that the ladies were the victims of alcoholism and not suffering from carbon monoxide poisoning in any way, joined with you in confirming what he knew to be a false diagnosis upon the records of the case?

Mr. Parmer:

He is a victim of his own objections. He is asking this witness to characterize the testimony of another doctor.

The Court:

The objection is overruled.

Mr. Mershon:

Read the question.

(Thereupon the preceding question was read by the reporter as above recorded).

401 A. I didn't talk to Dr. Harris.

Q. Did you say that Dr. Harris knew that your diagnosis of this case was alcoholism and not carbon monoxide poisoning?

A. He knew my views on the case.

Q. What were those views he knew?

A. I expressed them.

Q. Tell us what they were.

A. Alcoholism was the major one.

Q. You told him that?

A. Yes, sir.

Q. Did you also tell him that you were diagnosing it for the record as carbon monoxide poisoning?

A. No, sir; that was already written down.

Q. Did you explain to him why you were making a different diagnosis?

A. No, sir.

Q. Isn't it a fact that you simply told him that you suspected it might be alcoholism?

A. No, I told him very firmly what I thought.

Q. What did you tell him?

A. I told him firmly what I thought.

Q. What did you say?

A. That alcoholism was the main thing.

Q. Was that before his examination?

A. That was after his examination and before I had written this.

402 Q. Did he agree with you or disagree?

A. Apparently agreed with me.

Q. What did he tell you?

A. He told me that he thought I was right on it, and that my orders that were written in the beginning were perfectly correct, sir.

Q. Did he tell you that you were right in your views that it was alcoholism?

A. He told me that I was right in my views, but he didn't say alcoholism and he didn't say carbon monoxide or anything else; he just said I was right in my views.

Q. You had expressed to him over the telephone the history of carbon monoxide poisoning?

A. I told him the whole history. I gave him the whole history so he could have the same view I got.

Q. You had already upon the record entered your final diagnosis of carbon monoxide poisoning?

A. The final diagnosis doesn't go to the chart until the case is discharged, until the patient is ready to be discharged from the hospital. I never wrote a final on the chart, I know that; I have never seen the chart until about three days ago.

Q. But you had written on the chart at that time "apparent carbon monoxide poisoning"?

A. I think it is written there.

Q. You say that Dr. Harris concurred on the record with your view of apparent carbon monoxide poisoning, yet privately agreed with you that it was not true?

A. That is all right.

403 Mr. Parmer:

I object to the question. He is cross examining him on what Dr. Harris said.

The Court:

The objection is sustained.

Mr. Mershon:

I will withdraw the question and reframe it.

(By Mr. Mershon):

Q. Yet you say that Dr. Harris agreed with you privately that it seemed like it was an alcohol case, he neverthe-



less on the record agreed with you that it was likely a carbon monoxide poisoning case? Is that the statement you make to the Court?

The Court:

I didn't understand him to say that. He said that Dr. Harris did not mention alcoholism and did not mention carbon monoxide poisoning, but stated that he agreed that his treatment of the case was right.

The Witness:

That is right.

(By Mr. Mershon):

Q. What, doctor, is the meaning of cyanosis, medically speaking?

A. A bluish or blue discoloration of the skin or mucous membrane.

Q. Can it be black or different shades of blue; does it have to be any particular shade?

A. Varying in accordance with the lack of oxygen.

Q. Could it be red spots?

A. No, sir.

Q. Where the skin is discolored due to lack of oxygen caused by carbon monoxide combined with the hemoglobin in the blood, would you call that discoloration cyanosis?

A. No, you wouldn't call that cyanosis; it is a very bright color.

Q. Although it was caused by lack of oxygen?

A. Yes, that is right.

Q. Isn't it true that this discoloration may be violet, dark red or other colors?

A. Not that I know of, sir.

Q. If in this same Bulletin of the Department of Interior, Bureau of Mines, Reports of Investigations by R. R.



Sayers and W. P. Yant, May, 1923, Revised, May, 1935, in dealing with the subject of "Pathology", they say:

"The color of the skin of persons poisoned by carbon monoxide differs from the color of persons dying from other causes. Many show rose-red spots on the face, neck, breast, and limbs, and others dark red or violet; but the non-appearance of such spots should not be taken as indicating the absence of carbon monoxide poisoning. The face may be bright red, and doubt as to death having taken place is often expressed by laymen. The color of the skin between the spots is remarkably similar to that which appears after poisoning by benzol, potassium cyanide, or the action of cold on a corpse. The color of the skin corresponds to changes in the coloring of the blood. This is usually a bright cherry red, but it has also been found as a blackish red or entirely black. Two persons overcome under the same circumstances may show bright red blood in the case of one and very dark red or black in the case of the other. The coagulation power of the

blood is not changed. Reddening of the digestive tract with ecchymoses, effusions, or extensive hemorrhages is present in many of the cases. The peritoneum may appear bright red in color; ecchymoses have been found on the peritoneum. At times there are degenerative changes found in the walls of the blood vessels. There are no marked characteristic changes in respiratory passages. However, it is worthy of note that the larynx, trachea, and bronchi may be covered with viscous, thick, frothy mucus; or foreign matter, such as stomach contents, may be found in these passages; and all of which, even to the finest bronchi, may show a bright red to black-red color corresponding to blood changes."

Do you disagree with that?

A. My dear sir, I quote as my authority—and the only I have particularly read—Dr. Yewdall Henderson, and

Dr. Henderson has probably done the foremost work in the world on monoxide poisoning.

Q. Now I ask you as a physician or expert who has treated these cases, who was in charge of other cases of carbon monoxide poisoning, and as the physician who was in charge of the instant case, if it is not a fact that long after the carbon monoxide may have been eliminated from the blood through the use of oxygen combined with carbon dioxide the sequelae or ill effects continue?

A. I can't agree with you.

Q. You say it doesn't?

A. I cannot agree with you, sir.

Q. Isn't it a fact that there is a definite damage done to the brain and its coverings, as well as to the  
406 nervous system, including the spinal cord, which injury is there after the carbon monoxide has been eliminated from the blood?

A. The amount of poisoning that it would take to produce those symptoms would be deadly. That is my conception of it. It is a very rapid working thing.

Mr. Mershon:

That is all.

By the Court:

Doctor, as I understand it, Mrs. Just was unconscious when she was carried to the hospital?

The Witness:

No, your Honor, not unconscious.

The Court:

She was not?

The Witness:

She was in a semi-conscious condition.

The Court:

What would you say, without committing yourself to any exact time, as to when she completely regained her consciousness?

The Witness:

When?

The Court:

Yes.

The Witness:

Your Honor, I feel that she regained her consciousness completely, completely regained it, one and one-half hours after she was in the hospital.

The Court:

Now having regained her consciousness at that time; as I understand your testimony, you had doubts as to whether she was shamming in regard to her loss of memory or inability to talk or remember what happened on the boat?

The Witness:

Yes.

The Court:

Now is this a fact; if she were not pretending was her condition consistent with the results of alcoholism and also consistent with having been a sufferer from this gas?

407 The Witness:

Your Honor, her symptoms, the outcome of the whole general picture, is that of alcoholism, and that's all.

The Court:

You have not quite got my question. You say there was doubt in your mind as to whether she was pretending?

The Witness:

Yes, sir.

The Court:

Just assume she was not pretending.

The Witness:

All right.

The Court:

What was the condition you found her in there at the hospital after she regained her consciousness, assuming that she was not pretending? Was that condition consistent with the after affects of alcoholism?

The Witness:

Yes, sir.

The Court:

Was it consistent with her having been overcome with carbon monoxide gas?

The Witness:

It may or might not have been, sir. The variation there being, sir, is that in your carbon monoxide cases they are not completely out; the first thing that happens is that they faint and then they are out. With alcoholism you are able to arouse them up.

The Court:

Let's get down to a period of time, say just a day before she left the hospital.

The Witness:

° All right.

The Court:

Do I understand from your testimony that she was still at that time pretending, according to your opinion, to be suffering from an inability to express her thoughts?

The Witness:

No, she wasn't at that time.

The Court:

She was not at that time?

408 The Witness:

No, sir.

The Court:

Well, did she at that time freely discuss with you what had occurred on the boat or did she refuse to discuss it?

The Witness:

She didn't discuss it at all.

The Court:

Did you seek to talk with her about that?

The Witness:

I did at various intervals.

The Court:

And did she refuse?

The Witness:

No.



The Court:

Did she then have ability to express herself?



The Witness:

Yes.

The Court:

And she refused to do so?

The Witness:

Yes.

The Court:

Did she refuse to point-blank or did she refuse to discuss it or did she say she didn't remember?

The Witness:

She said she just didn't remember, your Honor.

The Court:

That is all I care to ask.

(By Mr. Mershon):

Q. This chart says, Dr. Howell, on March 4th, under your initials, which was the second day she was in the hospital, "Patient feels very good. Talks freely, however is apparently mentally cloudy yet".

A. Mr. Mershon, like I told you previously, I referred to that very hastily; I am sorry that thing was written as it was. I referred to the fact that she wouldn't talk as of the day before. I marked it as "cloudy", because of that.

Q. It is true in carbon monoxide cases that after a period of unconsciousness in many cases the patient has what you call a clear period, after which there is an affect of the so-called sequelae, or symptoms showing injury to the brain and nervous system?

A. That is not the way I understand it.

Q. Do you say that is not recognized as correct?

A. That is not the way I understand the pathology of it. I may be in error about that, however.

Mr. Mershon:

That is all.

410 Thereupon: CARL BLOUNT was called as a witness in behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Parmer:

Q. What is your name?

A. Carl Blount.

Q. Mr. Blount, how old are you?

A. I am 46 years old.

Q. Have you ever been on the witness' stand before?

A. I don't believe that I have.

Q. I don't think so either, because you want to get up every time we ask you a question. Tell me, Mr. Blount, were you engineer on this Friendship II?

A. Yes, sir.

Q. For Mr. Yeiser?

A. Yes, sir.

Q. How long before this party went out where these two girls got sick had you been engineer on that boat?

A. Well from the time that Mr. Yeister purchased it, and that was, I believe, in May, 1933; I may be a little wrong on that date.

Q. Well, now do you remember the occasion when the boat came back to Miami after finishing this trip where the girls were on and something was said about carbon monoxide gas?

411 A. Yes.

Q. Now at any time following that were you present when an inspection was made of the exhaust pipe?

A. Yes, sir.

Q. Well, now I want you to come over here to these exhaust pipes that are over here by the side of the room and testify there what you found on your inspection that you made and point out on the pipes what you found at the time.

A. After that?

Q. Yes, at the time you made the inspection. I might ask you first who was present at the time you made the inspection?

A. Mr. Don Roderick and there may have been some more of the crew around the boat, but we were the only active ones that were making the tests.

Q. Do you know how long after you came in that this inspection was made, that is, the date; was it the next day or the day after that or when?

A. It wasn't that day; it was the next day.

Q. Will you come over here, Mr. Blount?

A. (Witness leaves witness stand and goes over to the exhaust pipes.)

Q. Now, Mr. Blount, you are not aware of the way these pipes have been laid out here?

A. Yes, sir.

Q. Have they been laid out by somebody else?

A. Yes.

Q. Do you recognize that (pointing) as being the port exhaust pipe on the Friendship II?

412 A. Yes, sir.

Q. It looks like it?

A. It looks like it, yes.

Q. So you will not be confused, you see this part down here, Exhibit 1, is that known as the exhaust manifold?

A. No, sir.

Q. What do you call that?

A. That is the exhaust pipe.

Q. At what portion of the ship is that?

A. That joins on to the manifold.

Q. Where is it?

A. Right next to the motor.

Q. Is it in the engine room or not?

A. Yes.

Q. In the engine room?

A. Yes.

Q. This one is on the starboard side, you say?

A. Yes.

Q. The rest of it, as you have stated, is the port exhaust?

A. Yes.

Q. At the time that you made your inspection of the exhaust pipes, will you please tell us what you did?

A. Well, we had to roll up the rug on the boat, a fairly big rug, and we took all of the boards out of the ship, and down in the hallway of the ship we took all of these hatches out and we went in and we started the motor; in fact, we started both motors. We started this one  
413 - and we located a hole in it right away.

Q. How did you locate the hole?

A. From the water coming out of it.

Q. Whereabouts with relation to the rooms on the ship did you locate that hole?

A. Well, it was in the port, I reckon you would say. There was a room that went almost across the boat, and there was a small stateroom between that and the dining room and this was up in that way.

Q. Under the port bedroom, you would call it?

A. Yes, port stateroom.

Q. If you assume that this represents the end of the pipe in the engine room, will you follow the pipe along and show us just about where that hole was from which water was coming at the time on the exhaust pipe?

A. This hole right here (indicating).

Q. Well, it is on Exhibit 6 at the after-end?

A. Yes.

Mr. Mershon:

About four and one-half feet from the after-end?

Mr. Parmer:

Yes.

(By Mr. Parmer):

Q. After you discovered this leak did you make any effort to see the hole?

A. Yes.

Q. What did you do?

414 A. We got a flashlight and we took the light and just shined it down here and we looked as good as we could that way, and that is the way we located and saw what it was as near as it could be seen.

Q. Do you have a hatchway there?

A. Yes, right over it.

Q. How far below the floorboards was this pipe?

A. Probably eight inches; I would say eight or nine inches below the floor.

Q. You were standing on the deck?

A. Yes.

A. Yes.

Q. And this was below the deck on which you were standing?

Q. It was about eight inches below?

A. It was about eight inches.

Q. Where was the hole with respect to the pipe; was it on top of the pipe, below it or on the side?

A. It was on the lower side.

Q. Lower side?

A. Yes, sir.

Q. Well now I want to know whether you took the trouble to actually see the hole or not and if you did what did you do in order to see it?



A. Well, I had to get down, get my head down there; from the center of the boat we could see it fairly well; by shining the light on it you could see the hole  
415 fairly good.

Q. Did you get closer to it than the center of the boat?

A. We had our hand on it; we could feel the water coming out of it there.

Q. Did you see at any time the nature of the hole from which the water was coming?

A. Yes, sir.

Q. Will you describe the character of the hole at that time?

A. Well, it looked to me like there was a plug in it, and this plug was leaking; it was a little oblong hole; it wasn't very large. The hole wasn't very large. We judged that we couldn't hardly put a lead pencil in the hole; it was very small.

Q. What I want to know was any part of the plug in it at that time?

A. Apparently, yes.

Q. What makes you say "apparently, yes". I want to know what you saw there that makes you say that apparently some of the plug was there?

A. Well, merely the color of the pipe and everything was a little different in that particular spot there. I believe I can show you in another place there, for example, of how it would look different on the same pipe.

Q. Go ahead and show us what you mean.

A. I notice this hole (indicating); this hole wasn't in the pipe at the time; this hole here wasn't in the pipe when we examined it.

Q. You mean to say it wasn't opened?

A. No, this here (indicating) was not opened.

416 Q. All right.

A. Now right here, if you will come right here to the side (pointing); there is the point it was; there is

where it looked like a little seepage of water; not very much, but just dripping, but that was wet in a circle right around that thing (indicating).

Q. Just to make it clear, you are talking now about this hole on Exhibit 6 which is at the forward-end?

A. Yes, sir, and it was under the dining-room.

Q. It was under the dining-room?

A. Yes.

Q. Are you telling us that at the time you made this inspection that there was still a plug at this place where now appears a hole?

A. Well, it looked like this, and there is a plug which worked off of there. If you will make an examination you will see the front side and the—

Q. There was a leak at this place where now appears the hole?

A. No, it was up here around this where it looked like it has been plugged up.

Q. Now at the time that you saw it there did you see something that appeared to be a plug?

A. That which I pointed out.

Q. Do you know whether this was a plug or not?

A. No, sir.

Q. At the time that you and Roderick were  
417 there was there something that appeared to be a plug?

A. Well, when we patched that hole there we remarked that it looked like a plug in there, and it was kind of wet around it, and we wanted to get the boat back to the home port, and in putting these patches on we went ahead and patched that hole right there then.

Q. You didn't do the work yourself?

A. No, sir, but I was there, and he had the light on it and looked all along, and went along with hammers. Of course it had a lot of this asbestos back of it, but we just tapped on it to see the sound of it.

Q. This place which was at the forward-end of this Exhibit No. 6 you say that had a leak around the plug?

A. Yes, sir, just a very small leak, kind of like water, just foaming out; it was just a little foamy substance there; it wasn't very much; it was wet around this circle here (indicating).

Q. At the time it looked like a circle?

A. Yes, I believe right here you can tap that right there now and I believe you will find something of that nature there now, and this hole (indicating) was not in the pipe at the time.

Q. You did not see any hole there?

A. No, sir.

Q. What I want to know is with regard to this place that you did see a hole. What was the appearance of the metal or whatever it was around it?

A. Well, it was more or less brown.

418

Q. Brown?

A. Yes; it looked like it might be brass or copper, something like that.

Q. I call your attention to this hole at the after-end of Exhibit 6. When you saw the hole at the time that you made the inspection was the hole as big as it is now?

A. No, sir.

Q. Was the hole that you saw of the character and shape of the one that you see there now?

A. No, sir.

Q. Will you tell what the difference was between the way the hole was then and the way it is now in shape?

A. The back side of it looked like it was round, just like it is here now (indicating), and looked like a little place; I would say it was about one-third as large as that hole there.

Q. Did you get the idea that there was a part of a plug in the hole?

A. Yes, sir.

Q. And that a part of the plug was worn away?

A. I did. The plug had eaten up—we thought it was—

Mr. Mayne:

I object to that, what they thought it was.

A. What I thought it was.

(By Mr. Parmer):

Q. If you take the way the hole is now and compare it with the way the hole was at the time you inspected it, will you tell us about how much of the hole appeared then as compared to how much appears now, or do you think you could draw it out on a paper better?

A. The front of that hole is round and the  
419 other was just like the metal had just fallen off of there. You know that copper and brass when mixed with water, hot salt water, will get mealy and soft, and it gets so soft that you can mash it with your fingers.

Q. I am only interested in determining if I can from your testimony the difference in the size of the hole then as compared to the size of the hole as you see it now.

A. It is hard to divide that up and tell how it was, but this hole (indicating) wasn't all the way around; there was just a little piece like this here (indicating).

Q. Just a piece across?

A. Yes.

Q. I think I had better illustrate it to you on a piece of paper. Will you come here and use this table as a desk and first draw a circle to represent the way the hole is now?

A. Would you make it as near the same size as that hole?

Q. If you can.

A. All right.

Q. Try to make the hole as near the size as it is now.

A. (Indicates on diagram).

Q. You are representing the way it is now?

A. Yes.



Q. You had better mark that "A" to represent the way the hole is now.

420 A. (Witness so indicates).

Q. Now I want you to draw something to show us the way the hole appeared then; do it on the line below.

A. (Witness indicates on diagram).

Q. In other words, it was part of a circle?

A. Yes. It was part of the circle, and this was probably a little bigger than this here (indicating), and it run across that way on the back side toward the stern of the boat.

Q. There was still something else in what is now the circle?

A. Yes.

Q. What was the color of the rest of that part that was in the circle?

A. That was brown and a different color than the other pipe; the other pipe was kind of corroded and greenish color, but this was more like a brownish color. It is hard to describe the color, but it looked like there was a distinction between the two.

Q. You didn't have anything to do with putting either one of these repairs coverings around?

A. No, sir.

Q. You turned that over to Mr. Roderick?

A. Yes, sir.

Mr. Parmer:

Just for the record may we mark "B" to indicate the way the hole was at the time he inspected it?

Mr. Mayne:

According to the statement of the witness.

The Court:

Do you want to offer that in evidence?



421 Mr. Parmer:  
Yes, may I offer it in evidence?

Mr. Mershon:  
No objection.

The Court:  
Let it be filed.

(Thereupon the diagram above referred to was marked PETITIONER'S EXHIBIT No. 1).

Q. Now, Mr. Blount, did you at some later date cooperate with a chemist in making tests on board the ship with regard to carbon monoxide gas which might come from the exhaust pipe?

A. Yes, sir.

Q. And what did you do in connection with those tests?

Mr. Mershon:

If your Honor please, we object to the question as being irrelevant and immaterial; no predicate has been laid; he has not given the name of the chemist; he has not given the time or place; he has not given it with reference to the hole in this pipe or with reference to the hole that the witness says that he first found in the pipe, and it has not been shown that the conditions under which the tests were made were anything similar to the conditions existing aboard the yacht on the date of the accident or the date when the witness made the examination of the pipes and discovered the hole.

Mr. Parmer:

That is what I am attempting to do now, to lay the foundation. The other man made the tests. This man merely cooperated.

422 The Court:

I agree with Mr. Mershon that the predicate has not been laid for the tests being testified to. But you will proceed with your examination along the lines of laying the predicate.

Mr. Parmer:

That is correct, your Honor. I am asking him first what he did.

The Court:

All right.

(By Mr. Parmer):

Q. Do you remember where the boat was at the time?

A. Yes.

Q. Where was the boat?

A. The boat was in drydock; the boat was laying at mooring at the river's side.

Q. Now on March 2, 1936, when you were returning from down the Bay to Miami with these passengers on board, will you tell us at what speed the engines were running?

A. 550 revolutions per minute.

Q. What speed is that called?

A. The motors will turn around 700, but we usually run them about 750—I mean about 550.

Q. Now during the tests which were made on August 25th did you run the motors?

A. Yes, sir.

Q. And at what speed did you run them?

Mr. Mershon:

If your Honor please, it has not been shown that the conditions under which the tests were made were anything like the conditions of the trip in question. He is talking about tests which were made—

423 Mr. Parmer:

Just a minute; I will outline the nature of the evidence.

The Court:

I will overrule the objection. I do not think we have any testimony offered here as to what was the result of the test. I think the objection should come at that time; we are just developing now as to what was done.

Mr. Mershon:

Then, if your Honor please, before he undertakes to show what was done at the tests, before he gives any testimony of his tests, we would like to have the opportunity of examining him to see the conditions under which they operated coming up the bay.

The Court:

I imagine I will grant you that right.

Mr. Mershon:

When counsel has completed his examination showing the conditions coming up the bay, if there is anything further we would like to develop, we would like to have that opportunity.

Mr. Parmer:

Certainly.

(By Mr. Parmer):

Q. Now at the time you were running the motors in question in connection with the tests, will you tell us at what speed you were running the "motor"?

A. At about the same speed that we usually run.

Mr. Mayne:

What is that?

The Witness:  
Around 550.

(By Mr. Parmer):

Q. Now was the propeller moving?

A. Yes, sir.

Q. At the time that you were coming up from  
424 down the bay into Miami?

A. Yes.

Q. Now at the time that you made these tests was the propeller moving?

A. Yes.

Q. Now at the time that you were coming from down the bay to Miami, of course, you were moving through the water?

A. Yes.

Q. But when these tests were made were you moving through the water?

A. We were tied up to the dock.

Q. In that respect there is a difference?

A. Yes.

Q. Now what did you do with respect to the covering which was on this hole, which was the after-hole on Exhibit No. 6?

Mr. Mershon:  
When?

Mr. Parmer:  
At the time of the tests.

A. We unloosened the clamps and slipped the patch right up the pipe.

Q. Did you expose the hole?

A. Yes.

Q. What did you do first with regard to this hole; what did you do?

A. What did I do?

Q. Yes.

425

A. I held a hose on it for the chemist.

Q. How close to the hole did you hold the hose?

A. Right up against it.

Q. Was any hot water coming out?

A. Yes, sir.

Q. What did you do to keep your hands from being burned?

A. I picked up some rags and wrapped around the end of the hose and put the hose right up against that, and then the water would come out.

Q. How long did you continue doing that?

A. It seemed like ten minutes, but I don't guess it was over four or five.

Q. Did you continually hold it there until the chemist told you to stop?

A. Yes.

Q. Now you got through with that. What did you do with respect to this hole?

A. We pulled the hose back on it; covered it up and put it back.

Q. At any time did you expose the hole and run the engine for a long period of time?

A. Yes.

Q. You did?

A. Yes, sir.

Q. Now did that come before you had this operation of holding the hose or afterward?

A. We removed the hose first and run the  
426 motors for about two hours.

Q. Two hours?

A. Yes, I suppose something like that. According to our log book we ran it as long as it took us to run that morning coming in on March 2, about two hours and twenty minutes.



Q. Who was doing the timing, you or the chemist?

A. The chemist.

Q. He was doing the timing?

A. Yes, sir.

Q. So the first thing you did was to run them along for two hours and twenty minutes?

A. Yes.

Q. Was it after you had completed that that you did this other job of putting the hose on it?

A. Yes; it was after we run it that long, yes.

Q. When you made the tests how was the hole inside with respect to the size of the hole at the time you had inspected it, at the time that Mr. Roderick was on board the ship?

A. Apparently larger.

Q. How was it at that time with respect to the way it is now?

A. It didn't seem as round as it is right there now. We only had a small hose there, and I know that the small hose wouldn't go into the pipe at all; we had to hold it against it to get it fixed.

Q. At the time you made the tests was the hole as large or smaller than it is now in that pipe?

427 A. Apparently smaller.

Q. Was it round at that time or oblong?

A. It was more round than it was the first time, than it was before.

Q. After you had run these motors for two hours and twenty minutes with this covering of, did you go up to the aft-stateroom?

A. Yes.

Q. Was the chemist with you?

A. Yes, sir.

Q. Was Mr. Coleman along too; do you remember Mr. Coleman here?

A. Yes.

Q. Was he along at the time?

A. Yes.

Q. Now prior to beginning the test had anything been done with regard to the windows and the doors in that aft-stateroom?

A. Yes.

Q. What was done?

A. All had been closed.

Q. Windows and doors?

A. Yes, sir.

Q. You mean at the beginning of the running of the motors with the hose off?

A. Yes, sir.

Mr. Parmer:

Well, I believe it is only fair to you, Mr. Mershon, to let you ask the questions. I have come to the point where I want to show a fact.

428

The Court:

Was that a garden hose or what?

The Witness:

It was a little house hose.

Mr. Parmer:

Who brought the hose?

The Witness:

The chemist.

Mr. Parmer:

We have him here to testify, your Honor.

## Cross Examination.

By Mr. Mershon:

Q. Mr. Blount, I believe you said that despite all you could do in wrapping rags around the end of this hose, the hot water leaked out on your hands after all.

A. Well, the rags got wet.

Q. Did the water come out into the rags?

A. It leaked around the hose there; there was no way to get a perfect fit.

Q. You didn't have a perfect fit of the hose against the pipe; in other words, you couldn't get a perfect fit?

A. We got up right against it.

Q. The rag was there to catch the water that ran out on the outside of the hose to keep it from burning your hands?

A. That was what the rag was there for.

Q. And despite the fact you had the rag there water did leak out on the outside of the hose, the water that came out of the exhaust pipe.

A. The rag got wet, yes.

Q. So that all of the contents of that exhaust pipe did not go into the hose but some of same had leaked  
429 out on the outside of the hose and into that rag.

A. Practically all of it went in there.

Q. Just answer the question; some of it did not.

A. The rag got wet, yes.

Q. Was that salt water or fresh water you were running through the pipes at that time?

A. Salt water.

Q. Salt water?

A. Yes, sir, but not as salty as it is out in the Gulf.

Q. How far is that from the mouth of the river?

A. I don't know just the distance.

Q. Is there tide water there?

A. Yes.

Q. And the water is blackish but not—

A. Sometimes in rainy seasons it is; sometimes it is a little brackish.

Q. At the time you made the tests you say the hole that is in this pipe now, four and one-half feet from the after-end of it, wasn't as big as it is now; did you say that?

A. Yes. To the best of my ability I would say it is bigger.

Q. When you made the tests you didn't see the hole from the top looking down on it?

A. No, sir.

Q. The hole was in the bottom of the pipe?

A. No, sir.

Q. Where was it?

430 A. On the side.

Q. You mean this hole was on the side?

A. Not right in the bottom; no, sir.

Q. Tell us about where it is now.

A. In that respect it would be about there (indicating).

Q. Indicating the—

A. The angle of that being the lower side down.

Q. That would be about five o'clock on the face of a clock, is that about right?

A. I would say 25 to 30 degrees.

Q. Was that hole facing toward the middle of the boat?

A. Yes.

Q. And where were you standing when you were holding that hose?

A. I was standing right over the pipe.

Q. You were standing and your feet were above the pipes?

A. Yes.

Q. And you were holding the hose up against the pipe?

A. Yes, sir.

Q. You didn't get as good a fit on the hole in the pipe as you got here tonight?

A. No, sir.

Q. Don't you think you are mistaken when you say this hole is bigger now than it was then?

A. No, sir.

Q. Yet you didn't get a good fit in order to make the test?

431 A. You could see that hole from the center of the boat by getting down in there if you wanted to crawl in there and look at it.

Q. You did that?

A. Yes. In my case I was very anxious to see what it was.

Q. When you made the test you did that very thing; you got right down on the bottom of the boat?

A. Got right down over it and looked at it.

Q. You didn't get your eyes on a level with the hole at any time?

A. You mean looked right straight at it?

Q. Yes.

A. No, sir.

Q. Like you are looking out straight now?

A. No, sir.

Q. Until today did you ever see that hole clear like you are seeing it right now?

A. No, sir.

Q. What kind of a hose was this you say you brought over there; was it a rubber hose?

A. Yes, sir.

Q. Was it a ship's hose?

A. No, sir.

Q. What inside diameter did that hose have?

A. I couldn't say.

Q. You don't know?

A. I don't know.

432 Q. You said something now about your other tests where you run the motors for two hours and twenty minutes, and you further said that was the time it took you, according to the ship's log, to run



from where you started the motors in Biscayne Bay on March 2 until you got somewhere. Now, does the ship's log show how long it took from the time you started the motors in Biscayne Bay until these ladies were discovered in their staterooms and brought out on deck?

A. No.

Q. Then you are mistaken when you said you run them for the length of time the ship's log showed you operated on Biscayne Bay on March 2nd?

Mr. Parmer:

That is not what he said.

The Court:

He referred to the log-book to indicate the time it started until they anchored in the Bay. Now you asked him did the log show the time when the boat started until the ladies came out on the deck in that condition.

Mr. Mershon:

I will withdraw that question.

(By Mr. Mershon):

Q. Would the log of the Friendship II as of March 2nd show the time that morning when the motors were started up and the vessel headed toward Miami?

A. Yes.

Q. Will the log show when the boat docked in Miami on March 2nd?

A. No.

Q. Do you know when those entries were made in the log?

A. No, sir.

Q. On this morning of March 2nd when you were coming up the bay was the Friendship II towing any other fishing craft?

A. I don't think so.

Q. Had they used any other boat, fishing craft or otherwise, to fish in down there on that week-end?

A. Yes, sir.

Q. Where were they?

A. I believe the sailor was running it, or the mate.

Q. The mate wasn't on board the Friendship II when you came up the Bay on the morning of March 2nd, was he?

A. I don't know whether we were towing these boats or whether they were running them; we never made any log of that.

Q. You don't have any recollection of that?

A. No, sir.

Q. You don't have any recollection of that?

A. No, sir.

Q. The mate couldn't run both of them; if you were not towing them, it would take two men to run them?

A. Yes.

Q. The mate would run one and you might tow the other?

A. If that was the case. In rough weather we usually—

Q. By the way, was it slightly rough on this morning of March 1-2nd, 1936, down there?

A. Yes, sir.

Q. So the natural presumption is that you were running these other two boats back to Miami and not towing them behind the Friendship II?

434 Mr. Farmer:

I object to that, to the expression "natural presumption"; I don't think that is relevant.

The Court:

He is trying to find out what this witness knows. The objection is overruled.

Q. Would that be your belief now, that you were not towing these other two boats on the morning of March 2nd?

A. I don't remember exactly whether we were or not; I don't know, to answer you truthfully.

Q. How far south of the Royal Palm Docks was the Friendship II anchored on the early morning of March 2, 1936 when you started back to Miami?

A. I can give you the location of where we anchored, but I couldn't just say in miles.

Q. Then give the location.

A. The location was right at Featherbed Shoals.

Q. What relation was that to Pumpkin Key; how far was that from Pumpkin Key?

A. Well, it is a little more than half way from Royal Palm Dock to Featherbed Shoals as it is from Featherbed Shoals on to Pumpkin Key.

Q. Had you been anchored over the whole week-end over at Featherbed Shoals?

A. No, sir.

Q. Had you been as far south as Pumpkin Key?

A. We were right around it, not right at it, but we were right around it. We angel-fished there and  
435 anchored up in the bay.

Q. When did you come back to Featherbed Shoals?

A. We came back on Sunday evening.

Q. Did you run steam Sunday evening from Angelfish Creek until you came to the Featherbed Shoals?

A. Yes.

Q. What time did you stop in Angelfish Creek going to Featherbed Shoals?

A. Started at 7:30.

Q. What time did you get into Featherbed Shoals and anchor?

A. About 9:10 that evening.

Q. You were running about one hour and forty minutes?

A. One hour and forty minutes, maybe a little more or less.

Q. Or maybe a little more?

A. Maybe a little more or less.

Mr. Parmer:

May I request Mr. Mershon to confine his questions to the subject of whether a proper foundation has been laid.

Mr. Mershon:

My dear sir, I am laying your foundation now, I hope.

Mr. Parmer:

I have a chemist I would like to get off on the 10:00 o'clock train.

Mr. Mershon:

We are laying the foundation now for you.

(By Mr. Mershon):

Q. What time did you cut off the motors of the Friendship II when you arrived at Featherbed Shoals?

A. Whatever the time was put down when the motors were stopped.

436 Q. And that was Sunday night?

A. Yes.

Q. What time did you leave there Monday morning starting back to Miami?

A. 6:50.

Q. What time did you get back to Miami?

A. I think it was 9:10; we were two hours and twenty minutes; two hours and twenty minutes; two hours and twenty minutes from 6:50 would be that.

Q. Didn't you get into the dock about 8:00 o'clock?

A. No, sir.

Q. Do you recall when they found the young ladies in their bunks unconscious?

A. I recall the day.

Q. Do you remember the time of the morning?

A. No, sir.

Q. Do you remember how long it was before you got into Miami?

A. No, sir.

Q. Now it was kind of cold down there, wasn't it?

A. Pretty chilly, yes, sir.

Q. Does the Friendship II have ports opening over the bilges from the outside or windows from the outside—

A. You mean below the windows?

Q. Yes.

A. No, sir.

Q. There is no port hole forward or aft that opened directly into the bilge except the windows in the  
437 cabins, is that right?

A. Ask that question again.

Q. I just want to know if there were any ports or vents opening into the bilge of the boat, except the windows or doors that are in the cabin.

Mr. Parmer:

That question is confusing because the ports and doors of the cabin do not enter into the bilge. The question is improperly asked.

(By Mr. Mershon):

Q. Just forget about windows and doors in the cabins. Tell us if there are any ports or vents opening in the bilge of the boat from the outside.

A. No, sir.

Q. How do you get ventilation into the bilge of the boat from the outside?

A. Well, you open the windows and you get air all through the boat; there is nothing that comes in from the



outside except through the windows and doors and things like that.

Q. Do you have any funnels that would take in cold air and put it down in the bilge?

A. There is only one in the engine room; and I consider it draws more than it puts in when it is hot and warm weather.

Q. You do have a funnel opening into the engine room, directly into the bilge?

A. No.

Q. There is a funnel that goes out to the open air which connects with the engine room, through which air can come into the engine room, is that right?

438 A. Yes.

Q. Is there an opening around the propeller shaft where it goes through the after-bulkhead in the engine room connecting with the bilge from the engine room; is there an opening from the engine room into the bilge?

A. The engine room has a bilge, sir; it is more or less placed around the motors; it goes from there—

Q. I am asking you about whether there is an opening through that bulkhead from the engine room into the bilge?

A. The opening that these pipes went through.

Q. So that air coming into the funnel would come in the engine room and blow back through the after-bulkhead in the engine room into the after-bilge?

A. No, sir. The funnel we had was to take out hot air instead of bringing air in.

Q. If you were anchored and it was a fool night, is there anything in the world to prevent the air from coming in from the funnel above the engine room and going through that bulkhead into the aft-room under this state room?

A. It would have a time getting through that bulkhead.

Q. What was the size of the opening?

A. Just a little larger than this pipe; just as small as possible to allow your pipes and propeller shaft to go through.

Q. Is there an opening around the propeller shaft?

A. Very little.

Q. There was an opening?

439

A. Yes.

Q. You do not mean that it was airtight around the pipes and the propeller shaft—

A. No, it would not be airtight.

Q. Now, Mr. Blount, in making the test you talked about on August 26th, 1936, was any test made at the place indicated by the patch at the forward end of the pipe, Exhibit 6, about two and a half feet from the end?

A. No, sir.

Q. No water or gas was attempted to be taken from that pipe?

A. There wasn't a leak in that end there.

Q. Who made this examination where you and Mr. Roderick found the hole in the pipes, Exhibit 6; did you or Mr. Roderick make that?

A. Well, we both made it.

Q. Did you say that you did not find a place that was dripping a few drops of water about two and a half feet from the front end of that pipe, Exhibit 6?

A. We found that it was wet around that plug there, but we never found any hole like that in it at all.

Q. Did you find a drip?

A. Yes, I guess it would drip; it was more of a foam.

Q. It was foamy?

A. Yes, foamy.

Q. Would you say that would drip probably a bucket full in 24 hours?

A. If you had small enough bucket it might drip it full.

440

Q. I will let you set the maximum size bucket it would fill in 24 hours.

A. To be frank with you, I don't think it would fill an ordinary teacup full in 24 hours.

Q. Now what was the occasion of Mr. Roderick coming aboard to make that examination; did you get him?

A. Yes, I got him.

Mr. Parmer:

May I submit at this time that I believe this is going beyond the limit given Mr. Mershon to test the foundation that I have attempted to lay. I am perfectly willing to give him a chance on these subjects later.

Mr. Mershon:

I am just checking the conditions that he found.

Mr. Parmer:

Now he is getting to Mr. Roderick—

The Court:

I think, Mr. Mershon, that you have already gone far enough into that. Now, the last thing you were on was this plug up here on the forward-end of Exhibit 6.

Mr. Mershon:

We will leave him there. He said that he did not take that into consideration in connection with the tests. We have other uncontradicted testimony as to the nature of that hole.

The Court:

All right; do you wish to cross examine further on the matter of qualifications, as to similarity of conditions—

Mr. Parmer:

I do not at this time.

441 The Court:  
I was asking Mr. Mershon.

Mr. Mershon:

No, your Honor. I think I have laid the rule which he must come up to.

Mr. Parmer:

I wish to call the chemist now.

Mr. Mershon:

Unless counsel has other evidence to offer respecting the conditions under which he made this test, we should like to state our objections in the record to any testimony concerning the test of Mr. Blount.

Mr. Parmer:

All right.

Mr. Mershon:

We object to the offer of any testimony concerning any alleged test on August 25, 1936, as testified to by the witness Blount, because it has not been shown that the tests were made under the conditions the motors were operated on the night of March 1st and the morning of March 2nd. The witness Blount testified that the vessel, Friendship II, had been operated under power for a period of over one hour, to-wit, one hour and forty minutes on the evening of March 1st, beginning about 7:30 P. M., in a temperature which was cool and in water which was rough; that she laid at anchor and about nine hours later, without any evidence that the gases which had escaped from that hole in the pipe into the bilge had been exhausted or cleared out. The Friendship II was operated for approximately two hours or more coming into Miami in water which was rough and in cooler weather, whereas the purported test consists only of operating the motors, with propellor



442 turning, while the boat was tied up at Fort Meyers for a period of about two hours and a half, without showing any prior operation and storing up in the bilge of gases under the staterooms; second, the tests which Mr. Blount refers to did not take into consideration any leakage whatsoever from the port pipe, Claimants' Exhibit 6, about 21½ feet from the front end thereof, whereas the uncontradicted testimony by Mr. Roderick is that there was a decided leakage from that hole, and Mr. Blount himself admits that there was a seepage of a foamy substance there; third, that in operating the Friendship II it has been suggested that there were two boats which may or may not have been towed behind the Friendship II when she was coming to Miami on the night of March 1st and the morning of March 2, 1936, as to which there is no definite testimony before the Court, while it definitely appears that the test of August 25, 1936 was made without boats in tow. It has not been shown that the conditions at the time of the purported test were the same conditions or identical with the conditions under which the Friendship was operated on the night of March 1st and the morning of March 2nd, 1936. The witness Blount has merely testified that he ran the motors at about the same speed on August 25, 1936 at which he operated them in Biscayne Bay on March 1st and March 2nd, 1936, and he has not testified the speed at which he operated them in either case, nor has he testified positively that they were being operated at the same speed.

443

It has not been shown that there are any ports or vents, other than the windows, in the cabins or superstructure of the Friendship II.

It has been further shown by the witness Blount that the ventilation into the bilge of the Friendship II comes through the windows and the doors of the cabins, which themselves vent into the bilge, and it has not been shown by any evidence that the windows were open or closed



on August 25, 1936 as they were on the night of March 1st and the early morning of March 2nd, 1936, whereas the Court will take judicial notice of the fact that in March, 1936, when it is cold and rough on Biscayne Bay, the windows would naturally be in a different situation than they would naturally be on August 25, 1936, in the absence of any testimony upon the point.

So we say, if your Honor please, that it has not been demonstrated that the same conditions existed or that the motors of the Friendship II were operated under the same conditions on August 25, 1936 as on March 1st and March 2nd, 1936.

Now, as a predicate to that motion, we move to strike from the record the testimony of the witness Blount.

The Court:

Your motion to stike the testimony will be denied. Outside of that your objections are largely advisory as to what will be relied upon when the proper testimony is  
444 made. Some of these grounds are conditioned upon what will be developed in the testimony of the chemist as to what was done with the escaped gas. Right now I do not know, but the tests are not the same in the sense that whatever gases escaped through that hole were allowed to go through the bilge and seep through the vents into the staterooms or other parts of the boat. There is testimony or has been testimony here indicating that a hose was used, however, I must first hear the testimony of this chemist.

I will take your objections into consideration as advisory objctions, but so far there is nothing to rule on. I am not going to strike the testimony of the witness.

Mr. Mershon:

Then we will let it stay in the record.

The Court:

If you offer them as objections, I will overrule them, and I will say that I do not think there is anything before us to which they are applicable. Suppose you enter them in an advisory nature.

Mr. Mershon:

Very well.

The Court:

So far as your specific motion to strike the testimony of the witness is concerned, I will overrule that.

Mr. Mershon:

We may have been premature in our motion.

The Court:

All right, we will proceed with the chemist.

445        Thereupon: SETH STETSON WALKER was called as a witness on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parner:

Q. What is your full name?

A. Seth Stetson Walker.

Q. Where do you live?

A. In Tampa.

Q. What is your business?

A. Commercial chemist.

Q. Now did you on August 26, 1936 go on board the yacht Friendship II?

A. 1936.

Q. 1936?

A. Yes, sir.

Q. Where was the boat at that time?

A. In the river at Fort Myers.

Q. For what purpose did you go on board the vessel?

A. To make some tests of the carbon monoxide gas escaping from the exhaust pipe on the yacht.

Q. Will you describe the nature of the tests that you made?

A. The first thing we did was to measure the rate of flow of the gas that was escaping from the hole in the exhaust pipe, and we then—

446 Q. Before we go to what you did next, will you tell us what you did in order to determine the rate of flow of carbon monoxide gas from the hole, and may I ask you to specify if you can which hole it was that you looked at?

A. Is this the port pipe?

Q. The pipe at which you are looking is a part of the starboard pipe, and this is the rest of it. If you will take this end and fix it on here (indicating) you get the entire port pipe.

A. This is the bow here (pointing)?

Q. This is the bow here and this leads from the bow of the boat back, and this piece (pointing) is hooked on here, so that the extreme end of that goes out the stern of the boat.

A. I don't know as I could actually identify the hole without the approximate position—

Q. Do you remember which hole it was?

A. The hole was somewhat similar to that; it was down under the floor of the bilge, but it was on the inside. Has this pipe been turned over; is that in the same position?

Q. No.

A. I would say it was right in that position.

Q. What did you do with regard to that test?

A. You mean the test measuring the flow of gas?

Q. Yes.

A. We took a five-gallon bottle and filled it full of water; then we had Chief Blount hold one end of a hose, a laboratory hose, over the hole while I manipulated the upper end to connect with the gas that flows from  
447 that hose into the mouth of the bottle, so that the gas arose and filled the receptacle.

Q. How long did it take you?

A. It took four minutes to fill the five-gallon bottle.

Q. How close were you to Blount when this was going on?

A. We had the bottle located just about in this position, while he was down on his hands and knees holding that hose.

Q. Were you able to see whether he was holding it close at the time?

A. I wouldn't testify to that; I had enough with my end of the job; I don't know exactly what he did with his.

Q. Did you arrange for the speed of the motors at that time?

A. Yes; I should have stated that at the beginnig. The Chief started the motors and regulated them to what he called cruising speed. We let them run—I don't know how long—but I assume it was the proper time for them to become running smoothly, so that they would be in normal cruising speed, and then he timed it from that on to get our two-hour period.

Q. We are not concerned with your two-hour period yet. We want to get the bottle experiment through first.

A. The reason I said that was because the bottle experiment came, and then we occupied ourselves together on the rate of flow; in other words, these two tests ran simultaneously.

Q. Was that during the four minutes you took gas from this pipe into the bottle?

A. Yes, sir; it took four minutes to fill the  
448 bottle; it just happened to take that long to collect five gallons of gas.

Q. Did you take that gas which you had in the bottle and analyze it?

A. Yes, I did.

Q. And what was the proportion of carbon monoxide gas that you found in it?

A. 12.8 per cent. carbon monoxide gas.

Q. That is of the total content?

A. Yes, sir.

Q. It was 12.8 per cent.?

A. That is right.

Mr. Mayne:

12.8 per cent. of the five gallons?

The Witness:

Of gas, whether five gallons or a hundred gallons; that is the percentage figure.

Q. Are you familiar with the internal combustion engines to the extent of being able to tell us whether a motor which is running with a load runs more efficiently or less than one that is running without a load?

A. I cannot testify to that from my own knowledge, but I know the accepted textbook treatment of it, namely, that an automobile standing at the curb idling without a load will draw many times as much carbon monoxide gas as one that is on the road running.

Mr. Mehrtens:

If your Honor please, I move to strike that statement of the witness as to the possible, accepted view and the contents of textbooks on the ground that it is mere hearsay evidence.

449 (By Mr. Parmer):

Q. When you say it is not within your personal experience do you mean to say that you have not con-



ducted tests on automobiles and internal combustion engines to determine that fact?

A. No.

Q. But is it a part of your business as a chemist to know that fact from reading?

A. It is.

Q. Tell me, Mr. Walker, do you in the course of your business as a chemist confine your knowledge solely to those things upon which you have conducted experiments?

A. No.

Q. There are many things in your business as a chemist that you know through having studied?

A. Yes.

Q. And is this fact with regard to internal combustion engines one of those things?

A. Yes.

Mr. Mehrtens:

Do you know of your own personal knowledge that a motor idling will produce more carbon monoxide than a motor operating on the road?

The Witness:

No, sir.

Mr. Mehrtens:

Are you an expert on mechanical engines ?

The Witness:

No, sir.

Mr. Mehrtens:

We renew our motion to strike the testimony on the ground that it is hearsay, also on the ground that the witness is not competent to express an opinion of that nature, nor is he qualified.

The Witness:

May I inject a word? I have read many articles by authorities to that effect.

Mr. Parmer:

I do not submit that according to this expert's testimony it is a part of his business as an expert to know these things of which he is testifying and that it is not necessary for him to conduct personal experiments to find out in order to make himself an expert.

The Court:

He has qualified as an expert chemist.

Mr. Mehrtens:

Yes, but that is an incidental matter relating to his profession.

The Court:

And he says that he utilizes certain specific information that he gets from authorities in connection with his work, and while he is not an expert on that issue, automobile mechanics, I think he is qualified to tell us what is the accepted theory, as the experts in that line state, so I think it is competent for him to state that. I overrule the objection and deny the motion to strike.

(By Mr. Parmer):

Q. I want you to refresh your recollection a bit with respect to the order in which these tests were made. I think you told me that you made these tests with regard to the bottle in order to determine the rate of flow and the content while this two-hour test was going on. Are you sure of that?

451

A. Since you raise the question it is possible that I don't remember that correctly; and that thought came to me while ago, but that is the way I had

it in mind, but since you raise the question I would not be able to say positively.

Q. Was Mr. Coleman present during the test?

A. No, sir.

Q. But you did make this one test from which you determined the content of this mixture which issued from the pipe out of this hole?

A. Yes, sir.

Q. That is one of the tests you made?

A. Yes, sir.

Q. Did you make any determination of how many parts in say 10,000ths of air that would have been in the after-stateroom; did you make any determination as to how much carbon monoxide gas could issue from that pipe in the space of two hours?

A. Yes; that was the object of the test; we calculated that.

Q. Then you made a calculation of how many parts of carbon monoxide gas could issue within two hours; did you?

A. Yes, sir.

Q. Will you tell us what you calculated it to be?

A. I expressed that in this way—I don't know if I have the exact figure you refer to—but I figured what would have been the concentration in the after stateroom, assuming that all of the gas escaping from the hole was concentrating and sending all of the gas into the  
452 after-stateroom, then what would be the concentration of carbon monoxide gas in that room.

In the first place I took the measurements of the stateroom and from the figure figured its cubic capacity, and used that number of cubic feet in the calculation of that concentration, which figured three-tenths of one per cent.

o. 30 parts in 10,000.

Q. Is that all of it?

A. Yes.

Q. That is over this two-hour period?

The Court:

Do you mean to say that a five-gallon container could be filled in four minutes and that in a period of two hours there would be thirty times five, or 150 gallons of that product, of which 150 gallons 12.8 per cent. would be carbon monoxide gas?

The Witness:

Yes; I believe that is correct.

The Court:

And if you concentrated 12.8 percentage of 150 gallons of gas in that stateroom, the measurements of which you took, that would poison the air to the extent that you just testified?

The Witness:

I am not positive whether I followed you all the way, but let me illustrate how I arrived at that.

The Court:

All right.

The Witness:

The stateroom was 9 by 15 by 6.33, which means that it contained a capacity of 855 cubic feet. The flow of the gas from the hole, as already stated, was five gallons in four minutes, which figures out 020.06 cubic feet  
453 in two hours' time; in other words, 20.06 cubic feet of gas. Analysis showed that that gas contained only 12.8 per cent. carbon monoxide gas.

The Court:

That 20.06 is what?

The Witness:

That is the total cubic feet of gas that came out in two hours' time.

The Court:

If you take the content or what you have given as five gallons of gas or at the rate of five gallons every four minutes, the accumulation in a two-hour period would be equivalent to how much cubic footage?

The Witness:

20.06 cubic feet.

The Court:

Of which there would be 12.8 carbon monoxide?

The Witness:

Yes.

The Court:

If you diffused that amount of carbon monoxide in a stateroom of the dimensions which you stated, it would poison the air to what extent?

The Witness:

20.06 cubic feet.

The Court:

All right.

(By Mr. Parmer):

Q. Now did you make any tests to determine how much of the gas, of the carbon monoxide gas, issued from this hole actually would go into the room?

A. Yes, sir.

Q. What test did you make to determine that?



A. Not what would not get in but what would get in.

Q. I mean the after-stateroom.

A. Before the test was started we stretched  
454 a rubber hose from the head of the port bed out  
through the door, so that we could keep the door  
closed except for a small crack, which was necessary  
so as not to have to go into the room to get our sample.  
When we were all set to get our sample from that particular point, the point that Mr. Coleman considered the most important place to get the sample, being the head of the port bed, then, as I say, we closed the door and ran the engine for two hours, at the end of which time we pumped out the sample of gas through this hose without having to disturb the room, and collected samples of that gas which I took back to the laboratory room for analysis.

Q. After you had taken your gas out and you got your specimen did you open the door?

A. Yes.

Q. What did you observe when you opened the door?

A. The room was full of haze, a hazy blue, so to speak, and there was a strong odor that came out, the typical odor of exhaust gas from a combustion engine.

Q. During the experiment were all of the windows closed in the room?

A. Yes, sir.

Q. Did you examine the sample of gas which you took from the port bed?

A. Yes.

Q. What percentage of carbon monoxide gas  
455 did you find in that sample?

A. 7.8 parts per 10,000.

Q. Roughly 8 parts in 10,000?

A. Slightly less than 8 parts in 10,000.

The Court:

Did you make any calculation as to what percentage of the total gas that was coming through the pipe that came through this test hose?

The Witness:

You mean what percentage of the total escaped up in the room at that time?

The Court:

No; going back to your first test; your rubber hose test; did you make any figures or tests to determine how much of the total exhaust that was going through the pipe when the engines were running at the rate of speed that they were running that went through your hose into this bottle?

The Witness:

No, we didn't have any way to do that; we didn't know what the total exhaust gases might be.

The Court:

What assurance did you have that there was going into your pipe all of the gas that did escape through that hole?

The Witness:

Chief Blount will have to answer that; he was the man who held the hose on the pipe, and he was instructed to—

The Court:

Did any water come up through your rubber hose?

456 The Witness:

I don't know, because there was water already in the bottle; I doubt very much whether there was enough pressure to force water through the hose; naturally the gas would rise; I imagine that the water would pass on down the exhaust pipe.

The Court:

With a hole in the pipe like this, what amount of pressure would there have to be on the water going through to cause the water to escape upwards through this horizontal line, going up horizontally and escaping back through the pipe?

The Witness:

I do not have any figures to answer that. We were not attempting to measure the water that came out; it was the gas that actually came through that hole that we were after.

The Court:

Would atmospheric conditions have any effect upon the amount of gas which would come through; in other words, would the tendency of the gas to come up through your hose, rather than escape normally through the exhaust pipe, be increased or diminished by reason of any atmospheric condition?

The Witness:

I do not say that there would be no effect of that kind. Of course the greater the barometer pressure the more depressed the gas would be.

The Court:

This case, the actual incident in which we are interested, occurred in March, and your test was made in August. Now, would the difference in summer weather and early spring weather in Florida make any difference?

457 The Witness:

It might conceivably do so; in other words, gases are subject to expansion and contraction with temperature; it is well known that gas will expand; there will probably be some slight variation in that.

(By Mr. Parmer):

Q: Well now would you say that the gases in an exhaust pipe would be subject to that difference in barometer pressure?

A: To some extent, but let me qualify what I said a moment ago about the temperature. After all an exhaust pipe is so hot, so whether it was March or August, I don't believe there would be much difference in regard to temperature. It would heat up to about the same temperature whether it be August or March.

Mr. Mayne:

Would the question of certain classes of gasoline, pure gas or impure gas, create more gas from the motors?

The Witness:

It is possible.

Mr. Mayne:

Did you make any examination to see whether you were burning the same kind of gasoline that they burned in March in these motors?

The Witness:

No, sir.

(By Mr. Parmer):

Q: Now the rate at which you found the gas which issued from this pipe, that is, the percentage that you found of carbon monoxide in it was 12.8 per cent.?

A: Yes.

Q: Now, can you tell us whether that indicates  
458 a high content of carbon monoxide gas in exhaust gas or one of normal content for an efficient motor?

A: No, it is quite high.

Q: What is the ordinary percentage of carbon monoxide gas in the normal running motor?

Mr. Mershon:

We object to that, if your Honor please; the term "normal running motor" has no significance here. The witness is not qualified on engineering questions.

(By Mr. Parmer):

Q. Well, is it a matter of chemical engineering with regard to the use of fuels?

A. Yes, sir.

Q. What I want to know is what is the carbon monoxide content of the exhaust gas in a motor which is classified as efficient?

Q. [A.] Well, seven per cent. is the average figure accepted for that; that would indicate a motor of average efficiency, not extraordinarily efficient or inefficient.

Q. And the further you get away from that seven per cent. the further you get away from average efficiency?

A. Yes.

Q. You say that 12.8 per cent. that you had was poor efficiency?

A. Yes.

Q. Would that be caused by the fact that the engine at the time of the test was not dragging a load and not moving the ship?

A. I do not say that definitely, but that most probably had a lot to do with it.

459 The Court:

There is probably some reason why you adopted this particular method of testing. To my mind the natural question arises in connection with the desirability of having the test show how much carbon monoxide gas would escape into this particular room,—why you did not create a situation as similar to one that you were trying to compare as possible, namely, shut all windows in the aft-stateroom, and put the windows in the other rooms in their same condition, if you knew their condition, and



then start your motors and let them run two hours and twenty minutes, and see how much gas got into the room? Why didn't you do that?

The Witness:

We did that; I testified to that.

The Court:

Why did you use a hose or did you use a hose in that test?

The Witness:

For the reasons mentioned, so that we could get a sample from that particular point in the room without having to open the room and let the air out.

The Court:

In this last two-hour test you did not use the hose; you just let the gas escape into the bilge and—

The Witness:

This hose we used to get the sample of air from the room was an entirely different hose from the other. It was a long hose that I had with me for the purpose of reaching from the head of the bed clear out of the door to the hallway, so as to draw a sample of the air without having to open the door.

460 (By Mr. Parmer):

Q. The Court has asked you whether in making this two-hour test you allowed this gas to escape there in the bilge and let the gas go anywhere on the ship?

A. Yes.

The Court:

And this hose test was to extricate gas out of the aft-stateroom to discover its content?

The Witness:

I undoubtedly was mistaken awhile ago when I said that we took this sample while we were running the motors for the two-hour test; we would have too much sense for that; certainly we didn't do that. I never had thought about that.

The Court:

You didn't do what?

Mr. Parmer:

The witness stated first that he conducted this two-hour test in which the gas was allowed to run free into the bilge and escape where it would. Then he said he conducted this other test with the hose and the bottle in order to determine the rate of flow from the pipe, and he said that the hose and bottle test was conducted while the other two-hour test was going on. Now that was his first impression. I asked him if he were sure about it and he hesitated, and now he says that he is sure that he did not do it because that would be silly and would spoil the test.

The Witness:

I am dead sure that that was a mistake.

(By Mr. Parmer):

Q. That is, you completed one test before you made the other?

A. Yes, sir; they were separate.

Q. You say you closed the windows in the  
461 after-stateroom?

A. Yes.

Q. And these vents which went up in the walls and connected through the walls down in the bilge you did not touch those at all?

A. No, sir.

Q. You left them partly open so that anything in the bilge could come up?

A. Yes.

Q. Windows all closed?

A. Yes.

Q. And the door leading to the after-stateroom was closed with the exception of the place where it jambed up against the hose?

A. Yes, and that was negligible, because it was a soft rubber hose and we shut the door practically tight.

Q. And the gas would go through the hose?

A. By the time we got the sample we had the door shut so as not to pinch the hose.

Q. How did you withdraw the gas through the hose from the place near the bed?

A. By an air pump.

Q. Where did you put the sample that you withdrew?

A. In a clean bottle.

Q. In a clean bottle?

A. Yes.

Q. So that you had a gallon of the atmosphere around that port bed?

A. Yes, sir.

Q. How did you do anything with respect to the windows in the other staterooms like that port stateroom or the starboard stateroom, or do you know what condition they were in?

A. I don't believe I can remember that; as a matter of fact, I left that part of it to Mr. Coleman because he was familiar with it.

Q. You wanted to know how much would come up those ventilating slots on the side?

A. Yes.

Q. And you found that to be about eight parts in 10,000?

A. Yes, sir.

Mr. Parmer:

Your Honor, I do not want to excuse the witness unless you have no other questions for him to explain what he means.

Mr. Mershon:

We certainly have some questions.

Cross Examination.

By Mr. Mershon:

Q. Mr. Walker, how many cubic feet are there in a gallon?

A. I do not remember the table.

Q. You have demonstrated an experiment here from which you have given a deduction. Now let's follow you through and see what we get.

A. All right.

Q. Referring first to the first experiment, where you took the five gallons of air mixture into the  
463 bottle from the exhaust pipe in a period of four minutes. That would mean that you would get from that hole under the same conditions 150 gallons in two hours; is that right?

A. Yes.

Q. How many cubic feet are there in 150 gallons?

A. Well, I can only quote the figure that I calculated and put down here, which was 20.6 feet, and I believe you will find that correct if you will figure it out.

Mr. Parmer:

Do you have the tables there?

The Witness:

They may be in my brief case.

Mr. Parmer:

I wish you would get them if you can.

(Thereupon witness leaves the stand and goes to his brief case located on the front bench of the Courtroom and extracts therefrom certain papers.)

The Witness:

I have here a more elaborate calculation from which I made a summary and put in my book. The flow of gas from the hole was five gallons or 1155 cubic inches in four minutes. I had a factor there of cubic feet which was reduced to cubic inches, 231 cubic inches per gallon, and from that I got the 20.06 cubic feet in two hours' time.

Q. Then you took 12.8 per cent. of the 20 and fraction gallons and you found so many gallons of pure carbon monoxide gas?

A. So many cubic feet. This five gallons was used as a matter of convenience.

Q. Just to have a unit?

A. Yes, sir.

Q. Where did you get the measurements of  
464 this after-stateroom?

A. From Mr. Coleman.

Q. You did not measure it yourself?

A. No, sir.

Q. What were those measurements given to you as being?

A. 9 by 15 by 6.33.

Q. Were you told that this stateroom was of rectangular or cubicle shape, that is, that the side and the wall and the floor formed at right angles?

A. No, sir; I knew better than that because I saw the stateroom.

Q. Did you make any allowance at all for the fact that there was a dresser in there and reduce the cubic feet?



Did you make any allowance for the cubic feet taken up by the beds and the springs and the mattresses on them?

A. No.

Q. Two beds, springs and mattresses?

A. As a matter of fact I was trying to give a fair figure and allow all the space I could in there instead of making it worse than the other.

Q. How is that?

A. Well, then that would make the concentration still higher.

Q. It would have made it higher?

A. Yes.

Q. That would have been more unfavorable to your client than to ours, would it not have?

A. Maybe, if you look at it that way.

Q. Did you make any allowance for the private bathroom opening out of the stateroom?

A. No, sir. I took these figures as Mr. Coleman gave them to me. I take it that these figures allowed for the curvature of the walls.

Q. You didn't make any allowance there for the two clothes closets that appear here, or at least the walls of them that open into the stateroom?

A. I didn't. I don't know what Mr. Coleman did.

Q. So if you had made allowance for the cubic content of the beds, mattresses, springs, dresser or bureau, it would have decreased your cubicle content of the stateroom, would it not?

A. Yes.

Q. And it would have increased the percentage of saturation in that room if all of the gas that you drew out in the two hours had saturated in the stateroom?

A. Yes.

Q. So your experiment, you must admit, is not a success and is not correct if you are attempting to relate it to a situation where the dresser and the beds were in the stateroom at the time.

A. No, I wouldn't admit that.

Q. Your figure is not correct?

A. There may be some slight error there; after all in my conducted experiment it is not 100 per cent. perfect; it is impossible to do that.

466 Q. Taking your own figures they are not correct according to your own facts as you observed them because the dresser and the beds were in the state-room at the time, is that true?

A. Yes.

Q. And you made no allowance for their presence there?

A. Their ratio to the total would be quite small.

Q. The stateroom itself was quite small as rooms go?

A. Yes.

Q. How many cubic feet did you figure for that state-room?

A. 855.

Q. Isn't it a fact that at least 200 cubic feet could be deducted for the bunks and these other things which took up space in there?

A. I can't answer that without knowing the dimensions of these articles, but let me suggest that the dresser would not occupy much space; the doors are hollow and gas would seep into that space the same as the rest of the room; you can't figure the dresser as a solid object.

Q. Do you know if the drawers were empty at that time?

A. No.

Q. Assuming for the purpose of revising your figures that 200 cubic feet could be deducted for objects in the room, that would leave you 655 cubic feet?

A. Yes.

Q. After revising your calculation how much percentage of saturation would you have?

467 A. It would be 1.39 instead of 3/10th per cent. that I had, which would be 39 parts in 10,000.

(By Mr. Parmer):

Q. And the figure of 30 parts to 10,000 was just for all of the product that went into the one room?

Mr. Mershon:

Just a moment, please.

Mr. Parmer:

I am discussing that experiment now that we have revised that one.

(By Mr. Mershon):

Q. Before you started on this experiment had the motors been run recently or was your bilge clear of any suggestion of carbon monoxide gas so that you could start fresh and clear?

A. I don't know how recently they were run previous to this test; they probably told me at the time but it escaped my memory.

Q. The tests where you were building up carbon monoxide gas into the bilges to see how much would get into the stateroom, did you start with any aid of gas in the bilge or did you start clear and put gas in for two hours and then measure it?

A. I do not recall that. As far as my experiment went the engines ran two hours, plus enough time to get our gas in the five-gallon bottle. I cannot answer that.

Q. Then you are not familiar with the conditions surrounding that experiment, or may we not say that the result represented only what came out of the hole in the pipe, Exhibit 6, over the two hour period?

A. We made this test under the supervision, 468 you might say, of Mr. Coleman, and the Chief was asked to duplicate conditions as nearly as possible as they existed at this time.

Q. You only know that from what somebody told you?

A. Yes. I know what gas would get in the room; I don't know what the conditions were that they were trying to duplicate, but they did presumably.

Q. If there had been a residue of gas in the bilge of that boat hanging over from operations of a few hours previous, and then assuming that your experiment contemplated starting with a fresh clean bilge, you would have found a greater percentage of saturation or concentration in that room at the end of the two hours referred to in your experiment than you actually found?

Mr. Parmer:

Assuming what condition, Mr. Merchon, with regard to the windows in the room?

Mr. Merchon:

I am just assuming that—

Mr. Parmer:

You might assume that the windows and the door of the room were closed while this reservoir of gas was being built up, and also that the same condition was maintained after the experiment begun.

Mr. Merchon:

I will withdraw the question.

(By Mr. Merchon):

Q. How long did it take you to clear the stateroom and the bilge of these fumes after the motors had run the two hours referred to in your experiment?

A. We didn't even stay there to find that out.

Q. Was there any reason why you should  
469 not have stayed and checked it?

A. I do not think of any reason now why. One reason was that I was hungry.

Q. Did you have a headache?



A. No, sir.

Q. You didn't have a headache?

A. No.

Q. After you took your specimen, through that hose did you open the door and go in there and sniff around to see if you could smell the gas?

A. We didn't have to go inside to smell the gas; you could smell it from the outside.

Q. How long did you stay there?

A. I don't know.

Q. Did you go back later to see if you could smell it?

A. No.

Q. Do you know how long the gas and the fumes would stay in the stateroom and in the bilge from your two hours running before they would clear out complete?

A. No. The windows and the doors were open.

Q. Was there any prevailing breeze across that boat as you were making these tests?

A. I do not recall that.

Q. Which part of the boat was moored to the dock or the shore when the motors were running the two hours, was it the stern, the bow or the side?

A. My memory is that it was moored at the  
470 stern and bow. As I remember it we were parallel to the dock while this was going on, and I don't think we swung out into the stream.

Q. Isn't this a fact: that if a motor is turning up 550 revolutions per minute; if the motor is turning in the boat and the boat is free and is proceeding through the water and is giving away before the churning of the propeller,—now under those conditions isn't there less pressure on the motor than there would be if your boat were anchored solid and not giving way to the pressure of the propeller, and the motor was making the same number of revolutions—

A. You mean pressure through the exhaust?



A.[Q.] Yes, or compression on the cylinders of the motor itself, each and both?

A. There would doubtless be more pressure from the exhaust pipe if you were not pulling away from it. I don't know as I can answer about the condition of the propeller.

Q. You made the observation while ago that when the motors were operating under load the better combustion was obtained?

A. Yes.

Q. So that when standing still and the motor is working under greater pressure you ought to get better combustion of your gas than when the boat is sloshing through the water and the motor is getting less condensation?

A. I do not know if that follows or not, but it doesn't in the case of automobiles. I don't know about that.

Q. My dear sir, the principle of operating  
471 an automobile we both know is different, because when an automobile is standing still and the motor is running, the motor is not connected to anything. I call your attention to the dissimilarity of the two propositions. I am asking you as a chemist who has made the statement that combustion is better when you have pressure on your motors—

A. I don't think I will try to answer that question. I am not a mechanic enough to answer it.

Q. Then you are not taking the position that there was poorer combustion when you took this test of the gas than there would have been under operating conditions, with the boat moving through the water and the engine turning the same number of revolutions per minute?

A. I am not in a position to make a positive statement.

Q. Did you make any?

A. You drew the proposition between the automobile and the boat, and that was my firm thought, but since you raised the question I don't know.

Q. Aren't you as a logical scientist pretty well convinced that it does not?

A. I don't know. There are many factors entering into it.

Q. An automobile idling would be analogous to a motor in a boat idling with the propeller disconnected, would it not?

A. It sounds logical.

Q. In making your experiment did you pay any attention to the hole at the other end of the pipe,  
472 Exhibit 6, about two and half feet from the end?

A. No, I don't believe I know anything about that. Is that on the same pipe that the other hole is in?

Q. That is on the same pipe.

A. No, I didn't see that.

Q. Isn't it a fact that in making this experiment with the hose against the hole in the exhaust pipe through which water and gas would come, that water and gases escaped around the contact of the hose to the hole in the exhaust pipe and flowed over the outside of the rubber hose, and isn't it also a fact that gas must likewise have escaped and not gone through the hose?

A. You might assume it probably would, but the gas, as I stated while ago, being lighter than water, that is, the gas being lighter, it would naturally rise to the hose, and I think you would have some water escape around the edges without necessarily losing gas.

Q. If the pressure was sufficient to force water out through the contact between the hose and the pipe, wouldn't that same pressure be sufficient to force out with that water the gas which was lighter than air and wouldn't that have a natural tendency to rise in any event?

A. It might.

Q. Is it safe to assume, therefore, that if you lost water in making that experiment that you also lost some gas

that came out of that pipe that didn't get in that five-gallon jar?

473 A. I don't think you can assume that is necessarily so, but it would seem rather probable I suppose.

Q. And there is no way to tell how much gas you may have lost that came out of the hole in the pipe that did not get into the bottle?

A. No, I would not be able to testify to that.

Q. You made no allowance in your experiment for any possible loss of gas at the opening in the pipe where it contacted with the hose?

A. No, sir.

Q. What size was that laboratory hose with relation to the hole in the pipe in diameter?

A.  $3/8$  inch hole as I recall.

Q. That means  $3/8$  of an inch diameter?

A. Yes.

Q. What was the size of the hole?

A. I didn't measure it.

Q. For that experiment to have been properly conducted that hose should have been larger than the hole in the pipe to completely surround it?

A. That would have made it more perfect.

Q. Do you know whether that was the case?

A. No. Chief Blount will have to testify to that. I don't know now whether the hole is the same size as it was then or not. I know that we removed the asbestos at the time when we were making the test. I

474 wasn't able to handle both ends of the hose at the same time and I couldn't say absolutely what happened at his end.

Q. In other words, you can take any set of facts and reach a result, but in order for the result to mean anything the conditions and the figures themselves have to be proper ones?

A. I am morally sure that there was no material loss there. I couldn't swear there was no loss, but I am morally positive that there was no material loss. Any such tests, as I said before, is bound to be imperfect, but I believe the essential features of it can be entirely relied on.

Q. Do you know whether this motor had been operated from the middle of March until about the 25th of August when you made this test?

A. No, sir.

Q. Do you know whether the condition of a motor has anything to do with the amount of gas in its exhaust pipe, carbon monoxide gas?

A. The more efficient it is the less you have.

Mr. Mershon:

I believe that is all.

The Court:

When you were conducting the two-hour test water was escaping through that hole, wasn't it?

The Witness:

Water was coming out, yes.

The Court:

Did it accumulate enough there during that two-hour period so that you would have to pump out the bilges?

475 The Witness:

Not that I know anything about. I did not notice any unusual accumulation.

The Court:

There was not enough that escaped there in the two hours to cause the use of the pump?

The Witness:

I do not know of my own knowledge.

The Court:

What I had in mind was this: I do not know whether it would make any difference if there was enough water accumulating in the bilge to come up and cover the pipe—whether in pumping through the pipe it would be affected by the presence of water over the pipe? I do not know.

The Witness:

Say that again, Judge. Do you mean whether the amount of water in the bilge covering the pipe would affect the escape of gas so as to make the amount of gas different?

The Court:

Yes—to cause it to flow more naturally through the pipe rather than escape into the bilge?

The Witness:

Well, I don't think there would be much difference either way. I would say that the water would cause a certain pressure, and it would probably be slightly less in the water than without the water. I believe there would be a slight difference there, but I do not think there would be any serious difference.

By Mr. Parmer:

Q. Mr. Walker, how was it at the time you conducted this test; was the hose under water or was it above?

A. You mean the pipe?

476 Q. I mean the pipe and the hole from which the gas was coming. Was it under water or was it above?

A. I won't be sure about that; I believe the pipe was partly submerged under water.



By Mr. Mershon:

Q. Did you run this hose along the side of the door to the stateroom?

A. Which hose?

Q. The hose through which you later took your sample of gas out of the stateroom after the motors had been running two hours. Did you have to crack the door of the stateroom in order to run that hose out?

A. Very slightly.

Q. Was there any crack at all around the door through which gas and air could escape into the hall?

A. Probably a little crack there.

Q. Where did you spend your time during the two hours that you were filling the stateroom?

A. We went up and sat down part of the time.

Q. On the boat?

A. Yes.

Q. In the dining-room, salon or hall or the upper deck or just where?

A. I don't know just where, but we stayed down where we could keep this door under observation. I do not recall the arrangement of the boat well enough to say just where we stayed.

Q. Do you think you stayed for two hours in the lower part of the boat while you were filling the bilge with gas?

A. Not necessarily in that part.

Q. You took special care to see that you didn't get any of that gas in your lungs?

A. As I recall it, we didn't have anything of that kind at all. I don't think I smelled it at all.

Q. Do you know where you were during the two hours that you were filling the bilge with gas?

A. I don't recall the details, but I know we were right around it, around the boat there where we could keep tab on what was going on.

Q. Do you know whether you were on the boat or whether you were on the dock up there?

A. We were on the boat.

Q. You don't know whether you were on the after part or forward part?

A. I think most of the time was spent on the forward part, because there happened to be chairs to sit on there, and as I recall it we had a clear view through the hallway to the rear door.

By Mr. Parmer:

Q. Mr. Walker, in answer to one of Mr. Mershon's questions you were in doubt as to whether a boat which  
478 was moving under its own power put more of a strain on a motor than when the boat was at dock and not moving?

Mr. Mershon:

I object to the question because it is not based upon the question that I asked the witness, in that the element is omitted that the motor was turning up the same revolutions.

(By Mr. Parmer):

Q. Mr. Walker, I will ask you to assume in both cases that the motor is turning up the same number of revolutions. Were you somewhat in doubt as to whether a greater strain was on the boat when the boat was moving than when the boat was idle at its pier?

A. As I recall it, the doubt I expressed was about the pressure through the exhaust pipe and therefore on the cylinders. I don't know as I was asked that question.

Q. Do you understand that in order for a motor to move a heavy object like a boat that there is a greater strain on it than when it does not have to move it?

A. That is what I would suppose. I would suppose that the propellor in that case not moving it would rotate

in the same channel, so to speak, and would not develop very much strain on the motor, but I do not believe I feel competent to answer just how great the difference would be.

Q. But you appreciate that there would be a greater load on the motor when the boat was moving or as a consequence of its moving?

A. It must be, yes.

Q. And in that sense is the movement of a boat and the load that puts upon the motor analogous to  
479 the load which a moving automobile puts on a motor?

A. That is my version.

Q. The question was asked with respect to whether any gas was lost during this test in which you endeavored to determine by means of the hose and the bottle the rate at which gas came from this hole in the pipe. Well now who was able the better to tell whether gas was lost, you or the man that was holding the hose?

A. I wasn't able to tell at all.

Q. Whether any gas was lost or not depends upon how the hose was held?

A. Yes, sir.

Q. If it was held tight enough to keep the gas from coming out Mr. Blount can tell us that?

A. Yes.

Q. And you cannot?

A. No, sir.

Q. Now does the fact that Mr. Blount held a cloth in connection with the hose close to the pipe and that that cloth became wet in holding back the water, does that mean that gas was emitted as well?

A. No; the cloth is a very efficient—a wet cloth is a pretty efficient binding gasket.

Q. A seal?

A. Yes.

480 Q. Mr. Walker, I want you to look at your worksheet which I think you have brought with you. I call your attention to the fact that in giving us the time during which you allowed gas to go into the bilges for the purpose of allowing it to enter into the rooms you gave us the figure of two hours. Now I want you to look at your figures and see if that was the time that you used in arriving at your conclusions?

A. What figures are you referring to?

Q. I am referring to your conclusion with regard to the concentration, the actual concentration, which you found in the room after it had been sealed up; in other words, what I want to know is whether it was for two hours that the motors were allowed to run during that test or was it for a longer period?

A. According to my record here it is two hours, unless I copied it erroneously from my formal report that I made at the time. Two hours is what I have on this.

Q. Did that figure of two hours enter into your computation with respect to the amount of gas which was in the room?

A. No, no.

Q. That had nothing to do with that computation?

A. No.

Q. That was your memorandum with regard to how long the motor was run for the purposes of the test?

481 A. Yes. If I understand you right, the concentration we found in that room at the end of the test had nothing whatever to do with, whether it took two hours or one hour. When we arrived at that computation that was a definite fixed figure.

Q. Who was giving you instructions with regard to what tests would be made and how long the motors should be run in conjunction with the particular tests you were making?

A. Mr. Coleman. I think the Chief and the Captain both were consulted. Mr. Coleman was the man engineering it, in charge of it.

Q. Do you remember at that time that you consulted the log book or if the log book was consulted in order to determine the time the test should be run?

A. I don't remember that; I don't think I had anything to do with that; the others probably did.

Q. Who was holding the watch and who was keeping time?

A. Mr. Coleman was right by me and we both mutually kept time on it, but he actually held the watch.

Q. Was it Mr. Coleman who looked after such things as closing the windows and opening the doors throughout the tests?

A. Yes. He was the one that told what the conditions were that we wanted to duplicate. I don't know whether he personally closed the windows, but he was the one who said what was to be done.

Q. Did you pay any attention to the Chief when he was holding that hose against that hole, when he was trying to escape being burned by the hot water?

482 A. Yes, I recall very distinctly what a bad or difficult job he had in acquiring the position he had to get in to reach it.

Q. Did you note the position of his hands underneath or anything like that?

A. No, I didn't see that.

Q. You were some distance away from him?

A. Yes.

Q. Watching your bottle?

A. Yes. He was at the other end of the hose.

Q. I don't know whether you testified to this or not—I know that you testified with regard to the cubical contents of the room, but did you testify in regard to the dimensions as you received them from Mr. Coleman?

A. Yes.

Q. You got those from Mr. Coleman?

A. Yes, sir.



Q. Now let me see if I can recall to your recollection where you stayed while this test, which occupied roughly two hours, was going on. Do you recall that you spent any of the time up on deck?

A. I would not say positively about that, but my memory is that we stayed below where we could observe the door and see what was going on, but it is possible we didn't stay there all of the time. There was no-  
483 body else around there; we were all together continuously.

Q. You were all together sitting in chairs some place?

A. That is my recollection of it.

Q. But you think it was below that you were all sitting in chairs?

A. I think so but I won't be sure about it.

Q. Who were sitting around at the time?

A. Mr. Coleman, Mr. Blount, Captain Roberts and myself.

Q. Now this hose which ran from the head of the port bed in the after-stateroom and out through the door during this two-hour test,—will you tell us whether, while the test was going on, that hose was pinched?

A. It is my firm belief and memory that it was.

Q. It was pinched?

A. Yes.

Q. When you came to the point where you wished to find out the concentration of gas in the room what did you do then in order to get the gas from the hose?

A. We naturally had to release the door enough so that it did not pinch the hose.

Q. When you said that there was a crack between the door and the frame, did you mean to say that there was a crack there thru which you could see into the room?

A. Nothing like that; it was a very little rubber-hose and it flattened out. I wouldn't say that there  
484 was no crack, but there was probably a small crack on account of the hose.

Q. By reason of the thickness of the hose and the pinching of it?

A. Yes, sir.

Mr. Parmer:

That is all I have with this witness.

Re-Cross Examination.

By Mr. Mershon:

Q. That was the hose that you connected with the after stateroom and through which you drew out some gas. Was that the same hose that you used in taking the exhaust gas from the port pipe?

A. No, sir.

Q. Was the hose that you used in taking the exhaust gases from the pipe a flexible hose?

A. It was flexible, but a much heavier hose than this other one.

Q. In order for Mr. Blount to make a firm contact against the pipe was it necessary for him to pinch that hose?

A. He didn't pinch it.

Q. In order to do that would he not have to take a close, firm grip on it and thereby pinch it through its diameter?

A. No, sir. This hose that we used there was what we refer to in the laboratory as the Brann hose; it is quite stiff and heavy, yet flexible enough to be manipulated. It was used for such purposes as that.

Q. Now you say in this experiment where  
485 you let the gas come out of the hole in the exhaust pipe into the bilge and up into the after stateroom you let the motor run for two hours?

A. Yes, sir.

Q. And the figure which showed the concentration of gas in the after stateroom is based upon a two-hour run of the motors?

A. No, that figure of two hours has nothing to do with that figure; that figure of concentration in the stateroom is simply what was in the stateroom at the end of the two-hour period.

Q. All right, I agree with you there. If you had run the motors for three hours then you would have had more concentration in that stateroom than in the two hours?

A. Certainly.

Q. So I am asking you now what would be the proportionate rate of increase of concentration of carbon monoxide gas in the after-stateroom as the length of time that the motors were run should be increased?

A. I couldn't answer that; there would be too many factors bearing on it.

Q. It would be greater the longer the motors were run?

A. Yes, sir.

Q. And in your experiment your figures are based on two hours' running?

A. Yes, sir.

486

Re-Direct Examination.

By Mr. Parmer:

Q. Then you are right about the two hours?

A. Yes, sir.

Q. But Mr. Coleman was the man who was keeping the time?

A. Yes; he and I were together or supposed to be. If I fell down on that I don't know it. According to my recollection it was two hours.

Q. That is your understanding?

A. Yes.

## Re-Cross Examination

By Mr. Mershon:

Q. Do you mean to say that you are not telling the Court this experiment was based on a two-hour running of the motors?

A. My figures are based on the two-hour period.

Q. You made a record of the two hours at the time?

A. Mr. Coleman had the watch and he and I were together all the time during this period. I have got it down on my notes as two hours. If he disagreed with me on that I didn't know it, and I never heard of it before.

Q. Did you give Mr. Coleman a report of that test after you made it, showing the two-hour period?

A. Yes, sir.

Q. Was that ever called to your attention or questioned?

A. Not that I know of.

487 Mr. Mershon:

That is all. When counsel for the petitioner announces that he has concluded his testimony on that point, on the matter of these tests, we want to interpose our motion.

Mr. Parmer:

I have not concluded it.

The Court:

We will take an adjournment until 7:30 tomorrow evening.

(Thereupon an adjournment was taken to 7:30 P. M., October 8, 1937.)

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 373

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CHARLOTTE CROSS JUST AND ANNE ELISE  
GRUNER, PETITIONERS,

*vs.*

ALMA CHAMBERS, AS EXECUTRIX OF THE ES-  
TATE OF HENRY C. YEISER, JR., AS OWNER OF  
THE AMERICAN YACHT "FRIENDSHIP II"

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI FILED AUGUST 24, 1940.

CERTIORARI GRANTED OCTOBER 21, 1940.

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October 8, 1937, 7:30 P. M.

Theretipon: CARL BLOUNT resumed the stand and testified further as follows:

Re-Direct Examination.

By Mr. Parmer:

Q. Do you remember the last night that you were telling about how you were holding that hose on that test that the chemist was making down in the boat?

A. Yes, sir.

Q. And how you had a rag around the joint so you would not burn your hands; do you remember that?

A. Yes.

Q. I want you to tell us in greater detail just how you proceeded to put that hose on there and to put the rag on there, so that the chemist could go ahead.

A. To make this test we took a hose and we butted the end of the hose up against the exhaust pipe, and in doing that the water would come out around it, so I got a rag and this was wrapped around the hose, and then with this rag around it we held the hose firmly against the pipe. That was to keep this water from seeping on my hand and burning it. I pushed it right up against the pipe, and the chemist was there. To get this where this

489 exhaust was coming out through this hole we held that pipe so that that would come out there and this rag naturally got wet.

Q. When did it get wet?

A. It got wet while I was putting it on there; it was wet by the time I got it mashed up there firmly. We had the motors running while we were putting this hose on there.

Q. What do you mean by "getting it mashed up firmly?"

A. Firmly against the pipe so the water couldn't leak out and get in the bilge.

Q. How did you do that?

A. I put my hand right around the hose and brought it up with the rag.

Q. That is, pressing the rag against the copper pipe?

A. Against the exhaust pipe.

Q. When you got it mashed up firmly did any more water come out on the rag and onto your hands?

A. No, sir.

Q. When did you start timing the experiment?

A. After we got this hose fastened right so the exhaust would come out of it.

Q. Could you feel the exhaust coming out of it after you got hold of it?

A. Yes, you could feel the shaking from the explosions in the motor.

Q. Now, Chief, do you remember an occasion in September of 1935 when one or two of the sons of Mr. Yeiser were overcome by gas on that boat?

490 A. Yes, sir.

Q. Do you remember that?

A. Yes.

Q. Did you see the boys at the time?

A. I didn't see them right at the time.

Q. Did you see them afterwards?

A. Yes, sir.

Q. As a result of that did you receive any orders?

A. Yes.

Q. What orders did you receive?

A. I received orders to check the exhaust pipe and where this trouble was coming from.

Q. Did you check the exhaust pipes?

A. We gave them an inspection, yes.

Q. What inspection did you give them?



A. We started up the motors looking for leaks and then we took all of those hatches up, the flooring up, and got under there, and we saw there wasn't any leaks at all in there.

Q. And this was in September, 1935?

A. Yes, sir.

Q. Did you make any report of that at the time as to what you found on that inspection?

A. I made a report to the Captain and to Mr. Yeiser that we could find nothing that was wrong with the pipes.

Q. You did?

A. Yes, sir.

Q. Now after that did Mr. Yeiser give you any  
491 instructions with regard to the use of the room  
down below there?

A. Yes.

Q. What instructions did he give?

A. He gave instructions that whenever the boat was running and anyone was using the room, to keep the back windows closed.

Q. Why?

A. On account of the fumes coming in from the outside.

Mr. Mehrrens:

We object to the answer and move to strike that part of it which attempts to relate why Mr. Yeiser gave these orders, unless Mr. Yeiser told him at the time the reason.

(By Mr. Parmer):

Q. Let's find out. Chief, did Mr. Yeiser tell you the reason at the time that he wanted the windows in the back closed?

A. Yes.

Q. Because of the fumes coming in from the outside?

A. Yes.

Q. You mean the fumes formed on the outside from the end of the exhaust pipe?

A. (No audible answer.)

Q. Now do you know whether thereafter that practice was followed of keeping the back windows closed?

A. Yes, sir.

Q. That is, when the boat was running?

A. Yes, sir.

Q. Did anyone else take part in this inspection  
492 of the exhaust pipes at that time?

A. No, sir.

Q. You made the inspection?

A. Yes, sir.

Q. Did you look through the entire length of both exhaust pipes, port and starboard?

A. Yes, sir.

Q. And found no leaks at all?

A. No, sir.

Q. No leaks at all?

A. No, sir.

Mr. Mayne:

That was in 1935, is that right?

Mr. Parmer:

September of 1935.

Mr. Mayne:

Thanks.

(By Mr. Parmer):

Q. What about that part of the pipes which were under the engine room; did those have any leaks?

A. They were probably defective.

Q. What is that?

A. They were probably defective but they were not leaking, that is, they were not leaking outside into the boat.

Q. Why was that?

A. Because I kept it wrapped.

Q. What did you keep it wrapped with?

A. Tape. That was visible.

Q. You could see that?

A. Yes, sir.

Q. At times would the tape show a leak?

493 A. It would.

Q. What would you do when a leak would appear?

A. I would re-tape it.

Q. At the time that these women were on board, Mrs. Just and Miss Gruner, were these exhaust pipes or that part of them in the engine room, leaking then?

A. Not that I know of.

Q. In the course of your work on that trip didn't you have to be in the engine room?

A. Practically all of the time.

Q. Did you ever observe any leaks in the engine room?

A. No, sir.

Q. If there had been any leaks at that time and gas came into the engine room, would you have noticed that?

Mr. Mayne:

We object to that as calling for a conclusion of the witness.

Mr. Parmer:

I will qualify him.

Mr. Mayne:

All right.

Q. Had you observed leaks from exhaust pipes before? I will put it another way; have you been in rooms where exhaust pipes have been leaking?

A. Oh, yes.

Q. On those occasions has it been to the extent that gas fumes have been coming into the air in the room where you were?

The Court:

I think the objection is to the question of his former experience with gas leaking. Probably you  
494 should reframe your question.

Mr. Parmer:

Thank you, your Honor.

(By Mr. Parmer):

Q. Were you in a position, while you were working in the engine room on this trip, to see and notice leaks in the exhaust pipes in the engine room, if they had been there?

A. Yes, sir.

Q. Now from the time in September that you examined these exhaust pipes, September, 1935, up until the time in March, 1936, when this voyage with which we are concerned principally took place at about what rate did you have to pump your bilges?

A. Not very often.

Mr. Mayne:

We object to that and ask that it be stricken out.

The Court:

The objection is sustained.

Q. Will you tell us, Mr. Blount, about how often?

A. Well, maybe every two weeks or something like that; it would just vary; the boat wasn't leaking, and there was no water in it.

Mr. Parmer:

I will consent to strike that out.

Mr. Mershon:

That is all right. Let it go in.

(By Mr. Parmer):

Q. Was the pumping of the bilges about every two weeks the normal rate for pumping bilges over that entire period?

A. Yes.

Q. Is that about it?

A. Yes, sir.

Q. At any time during that period did you  
495 have to pump your bilges more often than that?

A. No, sir, and sometimes it was longer than that.

Q. Now at the time after you came back to Miami, after this voyage on which Mrs. Just and Miss Grunow were passengers had ended,—after that voyage had ended, and you looked into the bilge in order to see whether the pipes were leaking, what was the condition of the bilges at that time in relation to the amount of water in them?

Mr. Mershon:

We object to that, because it has not been shown that he looked in the bilges immediately after the voyage to see if the bilges were leaking.

Mr. Parmer:

I thought we proved that last night. I will withdraw the question.

Mr. Mershon:

If your Honor please, we object to that question unless it is so framed as to include Roderick in it. The question



is too indefinite and refers only to when this witness looked into the bilge.

The Court:

I will sustain the objection. I think that question is unduly prolix.

(By Mr. Parmer):

Q. Were you there when Mr. Roderick came down and examined the pipe?

A. Yes, sir.

Q. Did you join with him in looking for leaks?

A. Yes, sir.

Q. Now at that time did you observe the condition of the bilges as far as the amount of water in them was concerned?

A. Yes, sir.

496 Q. Will you tell us what that condition was at the time; how much water was in them?

A. There was some but very little.

Mr. Mayne:

We object to that and ask that it be stricken.

The Court:

That is a matter of cross examination. You can develop that further.

(By Mr. Parmer):

Q. Do you know at that time how deep the bilges were, that is, the bottom of the bilges below the floor of the state rooms?

A. On this particular boat there would be no water back under the stateroom. I always looked at my bilges from the engine room forward on the bow—

Q. On the engine room forward?

A. Yes.

Q. At this time when you looked at the bilges—

A. When we were making that inspection we had all of the hatches up and we looked all along through the back part of the boat and you could see down by the engines, and you could see just whatever was in the bilges anytime you wanted to glance down and look at them.

Q. I want to know how deep the bilges were at this time that you and Roderick were examining the pipes, if you can tell us in inches and feet.

The Court:

How deep the water was?

Mr. Farmer:

Yes, how deep the water was.

A. Well, in the center of the boat you would have a little water that would be deep, but there would  
497 be hardly no water in it.

Q. In the center?

A. Yes. Right down by the keel, that is, up forward before you get aft of the boat, the boat flattens out and there is practically no water at all aft, but in the engine room I would say four inches of water was probably in the bilge, but not aft of the dining room.

Q. Do you mean that it would be less than four inches aft of the dining salon?

A. It would run out to nothing as you went back.

The Court:

I don't know whether he is speaking of a normal condition or not. State the depth of water in the bilge on this particular occasion, according to your best recollection; not what was usually in there, but how much water was there at the time you and Mr. Roderick made the inspection.

The Witness:

Right where the motors in the engine room were or—

The Court:

In the bilges or where the pipes came out from the engine room back to the stern of the boat.

The Witness:

Your Honor, that would be hard for me to answer.

The Court:

Where the water was naturally deeper than any other place, how deep was it there on that occasion?

The Witness:

I would say four inches, probably five inches.

Mr. Parmer:

And where was that depth?

498 The Witness:

In the engine room. There was a small amount under the dining room, probably two inches, and about where this leak was in the exhaust pipe that was further back, which is practically ten feet back, and there was hardly any water back there.

(By Mr. Parmer):

Q. In other words, the farther forward you went the deeper the water got?

A. Yes.

Q. Was that condition of the bilges at normal?

A. Yes, sir.

Q. It was at normal?

A. Yes. That means like "normal" or "at normal."

Q. You don't know those words?

A. I asked so I would be right about it.

Q. Do you know what "usually" means?

A. Yes.

Q. Was that usual or unusual?

A. It was usual; it stays about that depth.

Q. Well, now, Mr. Blount, between the time that you examined these pipes, that is, exhaust pipes, in September, 1935, and the time you examined them again in March of 1936, did you have any knowledge that these exhaust pipes were leaking?

A. No, sir.

Q. Did any of the other inspections which you made from time to time take you into the vicinity of the place where you found a leak in March of 1936; do you understand that question?

A. Yes, sir.

Q. Will you tell us what your answer is to  
499 the question, if you understand it?

A. Yes, sir.

Q. Is your answer "yes, sir"?

A. Yes, sir.

Q. Tell us what work you had to do which would take you into the vicinity of these exhaust pipes in the place where you afterwards found the leak.

A. The bearings at the propeller shaft ran in there, and in order to oil them I had to take them out and oil those places. We oiled them probably once a month when we were running a great deal.

Q. And between September, 1935, and March, 1936, were you in fact running a good deal?

A. Yes, sir.

Q. You say you had to look at these propeller bearings about once a month?

A. Propeller shaft bearings.

Q. I see.

A. Once a month or every six weeks.

Q. Where would you have to go in order to oil these propeller shaft bearings; describe it for us so we can understand.

A. It is under the floor; it is under what we call the bilge of the boat.

Q. You would have to crawl through the bilge?

A. Didn't crawl through it, but we would have to get down and reach over with an oil can and grease the bearings.

Q. Where would you be when you were doing  
500 the work of reaching down?

A. Well, I would usually stand down in the bilges and probably reach over in another section and put the grease in or oil.

Q. In order to get down so you could stand in the bilge would you have to take any of the flooring up?

A. Take the hatches up; it was all made in sections. You could lift a whole center section out all down through the boat.

Q. Would that have to be done in order to stand in the bilges?

A. The sections had to be taken up to get to these bearings.

Q. While in that position were you anywhere near that section of the exhaust pipe in which you afterwards found a leak, that is, in March of 1936?

A. The pipes ran parallel with the shafts.

Q. How far away were they from the shafts?

A. Probably two feet; it varied, you know; sometimes it would be close and sometimes farther away.

Q. When it was close how far would it be?

A. Probably a foot.

Q. When it would be farther away how far would it be?

A. Probably two feet.

Q. How many propeller shafts did you have?

A. Two.

Q. Did they both run parallel to each other?

A. Yes, sir.

Q. How far apart were they?



A. The two shafts?

Q. Yes.

501 A. The shafts are about five feet apart, I suppose.

Q. About five feet?

A. Yes, sir.

Q. When you say that the exhaust pipe was at a distance varying between one foot to two feet from a propeller shaft, do you mean it was about that distance from the propeller shaft which was nearest to it?

A. Yes, sir.

The Court:

He didn't say there were two exhaust pipes; he said two propeller shafts.

Mr. Parmer:

I understand that, but I am trying to make a record on it.

The Court:

All right.

(By Mr. Parmer):

Q. Now at any time while you were in the bilges during this period between September, 1935, and March 2nd, 1936, in the course of doing this work, oiling the propeller shaft bearings, did you observe any leak in the exhaust lines?

Mr. Mayne:

Up until what time?

Mr. Parmer:

The time was limited up to March, 1936.

Mr. Mayne:

What time in March?

Mr. Parmer:

Well, we will make it March 2nd.

The Court: .

I think the time is included in the question. Read the question.

(Thereupon the preceding question was read by the Reporter as above recorded.)

A. No, sir.

Q. On those occasions when you were doing  
502 this work, during the time I mentioned before,  
did you look at the exhaust lines?

A. I couldn't help but look at them, but I didn't make a thorough inspection of them.

Q. That is, you didn't get a full view of them?

A. No, sir.

Q. How far away were they from your eyes?

A. Not over four feet; at the most three or four feet.

Q. Have you any recollection of how long before March 2nd, you went into the bilges for the purpose of oiling the propeller shaft bearing; have you any recollection of that?

A. No, sir.

Q. Well, I think you said that your ordinary course was once a month and at the outside once every six weeks?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Did you have to do that work for the proper running of the vessel?

A. Yes, sir.

Q. You had to keep these things oiled?

A. Yes, sir.

The Court:

Was the engine running and the shaft turning when you did the oiling?

The Witness:

Sometimes they were and sometimes they were not.

503 (By Mr. Parmer):

Q. Mr. Blount, on the morning when the vessel arrived in Miami after the trip with which we are concerned; that is, on March 2, 1936, do you know who it was who called Dr. Howell?

A. I do.

Q. You do?

A. Yes.

Q. Who?

A. I did.

Q. How did you call him?

A. By 'phone.

Q. Did you speak to him?

A. Yes, sir.

Q. How long after you called him did he come down to the boat?

A. Just a few minutes.

Q. A few minutes?

A. Yes, probably thirty minutes.

Q. Now on the afternoon of March 2nd, while Miss Grunow was still on board the ship, did you buy any liquor?

A. Yes, sir.

Q. What liquor did you buy?

A. One quart of Johnny Walker.

Q. Who gave you the money?

A. Mr. Yeiser.

Q. What did you do with that liquor?

A. Carried it up on deck and delivered it to him.

Q. To whom?

504. A. To Mr. Yeiser.

Q. And where was Mr. Yeiser when you gave it to him?

A. He was on the after-deck.

Mr. Parmer:

That is all.

Mr. Mershon:

If your Honor please, we move to strike the last three questions and answers as to this witness buying liquor with Mr. Yeiser's money and giving the liquor to Mr. Yeiser, as being irrelevant and immaterial.

Mr. Parmer:

I ask that it remain until I connect it up.

The Court:

Do you expect to connect it up?

Mr. Parmer:

I expect to, and I will consent to it being stricken if I do not.

The Court:

All right; I will grant the motion subject to it being connected up.

Mr. Mayne:

Of course it is in the record for all purposes.

The Court:

I do not see the materiality of it, but we will leave it in subject to it being connected up.

Mr. Mershon:

I would like to inquire if counsel has finished his examination of this witness.

Mr. Parmer:

Yes.

Mr. Mershon:

Is this the complete direct examination of this witness or do you expect to call him for further direct examination. I am asking that question before we undertake to cross-examine.

504 The Court:

That is my understanding; that he has completed his direct examination.

Mr. Parmer:

My direct examination has been completed, but after my friend gets through with his cross, I hope I may be able to—

Mr. Mershon:

Have you finished your direct examination?

Mr. Parmer:

I believe I have. It may be that I have overlooked something that I do not recall at the present time.

#### Cross Examination.

By Mr. Mershon:

Q. Chief, when the Friendship II is proceeding under way with both her engines turned up to 500 to 550 revolutions per minute, and there is no head wind and no tail wind and a calm sea, what speed does she produce?



A. I would say eight miles.

Q. Eight nautical miles or eight land miles, do you mean?

A. It probably would not be eight nautical miles.

Q. You mean eight land miles rather than eight knots?

A. Yes.

Q. That is per hour?

A. Yes, sir.

Q. Would there be any difference in the speed whether she was turning 500 or 550 revolutions per minute?

A. A little, yes.

Q. Would it vary as much as half a mile an hour?

A. Probably would.

Q. Would that be about the variance; if not, what do you think would be the difference in speed?

A. I could not say; there would be a little  
506 difference.

Q. What was the usual and ordinary cruising speed of the Friendship II in revolutions?

A. 550 was what we usually ran; 550 revolutions per minute.

Q. And that is what you gauged her speed by as far as you were concerned, by revolutions rather than miles?

A. Yes, sir.

Q. Have you given further thought to the question that was asked you last night as to whether the Friendship II towed these two fishing boats down the bay when she left here about February 28, 1936, on this memorable voyage?

A. Going down?

Q. Yes.

A. I don't believe you asked that question going down.

Q. I did not, but I am asking you now and you can tell us now whether you towed the two boats behind the Friendship II going down the bay.

A. I really don't know whether we towed them or not.

Q. Do you remember whether you operated one of these fishing boats while the Friendship II itself was at anchor on that trip down the bay?

A. Yes, sir.

Q. Did you go aboard that fishing boat and start it, start the motor when you got down the bay?

A. Yes, sir.

Q. Do you recall whether that fishing boat was towed back to Miami by the Friendship II, do you  
507 remember that now, the one that you operated?

A. We usually towed it back to the—I believe we run it back at least a part of the way.

Q. Which part of the way would that be?

A. That was the morning coming in, the morning of March 2nd.

Q. Do you remember distinctly that when you came up to the Royal Palm Dock those two boats, extra boats or fishing boats, were not being towed behind the Friendship II?

A. Yes, sir.

Q. They were not connected with or being towed by the Friendship II when the Friendship II came into the port of Miami and docked at the Royal Palm Dock; you are positive of that, are you?

A. Yes, sir.

Q. On the trip back when, if at all, were these two fishing boats towed by the Friendship II coming from Angelfish Creek?

A. On Sunday night if they were towed; I couldn't answer that.

Q. You don't know whether they were towed at all coming back?

A. No, sir.

Q. If they were not towed who ran them back?

A. The mate.

Q. What is his name?

A. H. C. Mickle.

Q. So, Chief Blount, you are here stating positively then that on the morning of March 2, 1936, being Monday morning, when these two young ladies were found unconscious in their bunks, this mate, Mr. Mickle, was not aboard the Friendship II but was aboard this other boat coming up separately. You make that statement, is that right?

A. Yes, sir.

Q. When the mate, Mr. Mickle, got aboard the fishing boats to run them into Miami from that trip, what did you do?

A. Then we left Featherbed Shoals that morning.

Q. Did he sleep aboard the Friendship II or did he sleep aboard the two fishing boats that night?

A. He slept aboard the Friendship II.

Q. Did he leave ahead of the Friendship II or behind?

A. That I couldn't say; I don't know.

Q. You don't know whether the Friendship II got in first or the other boats got in first?

A. No, sir.

Q. Which was the faster, the two fishing boats or the Friendship II?

A. The fishing boats were the faster boats, and when they were running them they stayed along with the big boat.

Q. But you don't know when they got in on that day, March 2, whether it was before the Friendship II got in.

A. No, sir.

Q. I believe you stated last night that you thought Mr. Yeiser acquired the Friendship II in May, 1933. I will ask you if you are not mistaken about that, and if it was not in May, 1934. Now you figure back and see which you think is the right date, 1934 or 1933.

A. To be frank with you, I don't know just when he did acquire it right now, that, is to remember the time.

Q. Where was she when you first went aboard as engineer?

A. At Fogal's Boat Yard.

Q. In Miami, Florida?

A. Yes, sir.

Q. Who negotiated to employ you; was it Captain Roberts?

A. Yes, sir.

Q. You live at Fort Myers, do you not?

A. Yes, sir.

Q. And Captain Roberts also lives there in Fort Myers?

A. Yes, sir.

Q. Had you ever served with Captain Roberts as engineer before that time?

A. Yes.

Q. How many years?

A. Well, I had been with Captain Roberts since the 1st day of December, 1929, up until the 8th day of October, 1936, and the time was on the Friendship I and Friendship II.

Q. Now, Chief, you spoke of a period between September, 1935, and March 2, 1936; that would cover the winter of 1935-36, would it not?

A. Yes, sir.

Q. How many other winter months or seasons had Mr. Yeiser owned and operated the Friendship II prior to that time; was it just one or was it two prior to the winter season of 1935-36?

A. One I guess.

Q. Just one?

A. Yes. That is prior to 1935?

Q. That would be the season of 1934-35. So he must have acquired her in May, 1934, rather than in May, 1933?

A. That is probably right.

Q. Was Mr. Yeiser on board when you first went on board at Fogal's Boat Yard?

A. No, sir.

Q. What time of the year was it when you went on board at Fogal's Boat Yard; was it in May, 1934?

A. I would not say; I would not say it was in May; I don't remember just when we did get that boat or when Mr. Yeiser got the boat, but I was on the boat before they bought it and looked it over and things like that.

Q. Before they ever bought it?

A. Yes.

Q. Before Mr. Yeiser bought it?

A. Yes.

Q. From the time you went on board the Friendship II at Fogal's Boat Yard did you continue to remain as engineer until at least March, 1936?

A. Yes, sir.

Q. Chief, tell us now in your own words how much time Mr. Yeiser spent on board the Friendship II; what parts of the year and to what extent he lived on the Friendship II from the time he got her in 1934 up until March 2, 1936? I might predicate that by way of explanation upon your statement that you were engineer on board during all of that time.

A. It is hard to remember those times, when anyone is coming and going.

Q. Do you remember?

A. I can remember fairly well the last.

Q. Well, all right, suppose you start with that.

A. Mr. Yeiser came aboard in September, on the night of the 1st of September, 1935.

Q. All right.

A. He was aboard the boat up until the holidays, Christmas holidays, and he was off for a period there and his family used the boat, and as soon as they were off he came back on the boat and at that time he stayed



until his death. There were two days that he was off, or three or four days, and that was along when his son died on the 13th day of October, during that time.

Q. Had Mr. Yeiser laid the boat up during the summer of 1935, prior to September 1st, when he came aboard?

A. She was being put in condition.

Q. When did he get off of her, in the spring of 1935 or the summer of 1935, as the case may be?

A. He left about one month after he bought the boat, possibly a month after he bought the boat. Now to get the date of that I would have to look the records up as to when he bought it.

Q. How much time did he spend aboard the boat during the winter of 1934-35, that is, the winter preceding this accident?

A. I could not say, but not as much as he did this last winter.

Q. Did he spend considerable time on it?

A. Yes.

Q. And he had his quarters there and just lived on the boat?

A. Yes.

Q. You stated on your direct examination that Mr. Yeiser had a young son or two who was overcome by carbon monoxide on the Friendship II. Do you recall that occasion?

A. I remember when he was brought out of there and he was sick.

Q. Was it just one child?

A. There was two of them.

Q. Two of them overcome and brought out?

A. One of them didn't notice it so much, and the other one was a little hazy about it.

Q. Who brought them out?

A. I don't know.

Q. Where were they brought out of?

A. Out of the aft-stateroom.

Q. Where the young ladies were later found unconscious?

A. Yes, sir.

Q. Did you see the children?

A. Yes.

Q. Was that a boy that was knocked out or a girl?

A. Neither was knocked out, not unconscious.

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Q. Suppose you tell me about it. Tell us what you saw and what happened.

A. They just went back to take a rest and one of them went to get up and when he went to get up he kind of fell over on the floor and said he felt bad, and his brother was laying on the other bed and someone woke him up and they came on the outside.

Q. What time of the day was this?

A. I don't remember.

Q. Was it in the afternoon?

A. I don't know.

Q. Where was the boat; was it tied up at the dock?

A. No, sir.

Q. Where was she?

A. It was running.

Q. Whereabouts?

A. I don't know that.

Q. Was it in Biscayne Bay?

A. I don't know.

Q. Were you aboard?

A. Certainly.

Q. You were the engineer in charge?

A. Yes.

Q. Who brought them out of the stateroom, the children?

A. I don't know.

Q. Who else was aboard on that occasion; was Captain Roberts aboard?

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A. Yes.

Q. And who else?

A. The rest of the crew.

Q. The same crew that was aboard when Mrs. Just and Miss Grunow were brought out unconscious from the same stateroom in March, 1936?

A. I don't know, whether they were all there, but most of them were.

Q. You were asked if that happened in September, 1935. Was it at that time or was it in December, 1935, when Mr. Yeiser's family were aboard the yacht that the two children were overcome by gas?

A. It was in September, because it was when we first went out on the boat.

Q. And what other members of Mr. Yeiser's family than the two children were aboard?

A. He had a doctor, a druggist from Cincinnati, with him as his guest.

Q. What was that doctor's name or druggist's name?

A. Dr. Geisler.

Q. Was Mr. Yeiser also aboard?

A. Yes, sir.

Q. Mr. Yeiser was a divorced man, was he not?

A. That's the way I always thought he was.

Q. It was his divorced wife and their children who were aboard during the holidays in December, 1935, when he remained off the boat?

A. Yes, sir.

Q. What interest did Mr. Yeiser take in the operation of the boat when he was aboard and you were cruising; what did he do on or about the boat?

A. He would read.

Q. Would he go to the wheel-house and talk to the Captain and help him lay out the course and direct the route they were taking?

A. They would talk about it.

Q. Did you ever see him hold the wheel?

A. Sometimes for short periods; very short, though.

Q. As a matter of fact he was somewhat interested in navigation and had already gotten some kind of papers for himself?

A. I don't know, but I know he was interested in navigation. I don't know nothing about the papers, except the ones he was studying.

Q. He was studying navigation?

A. He did for a little while anyway.

Q. Was he interested in the motors and the engineering part of it?

A. Very little.

Q. Well, did he ever discuss them with you? I am not talking about the exhaust pipes. Don't get nervous, because we have not reached that point. He never came into the engine room and sat down and talked to you and watched the motors run?

A. Very seldom.

516 Q. That means that he did occasionally?

A. Well, he would come around occasionally, but very seldom.

Q. Did he ever come in the engine room and sit down there and talk to you about the operation of the engines and the operation of the boat?

A. I don't believe he did.

Q. You don't believe he ever came into the engine room at all?

A. Sure he would come in there, but we didn't talk about operation of the motors.

Q. What did he talk about when he came in there?

A. Most anything.

Q. Did he look at the motors at all?

A. I guess he would.

Q. Did he ever ask you any questions about them?

A. No, sir.

Q. Never asked a single question about these motors?

A. He probably asked me some, but there was nothing about the running of them or anything.



Q. This piece of the starboard exhaust pipe, Exhibit No. 1, was sitting right up in the engine room above the floor and connected to the engine room, wasn't it?

A. Yes, sir.

Q. And it was connected to the first engine that you came to as you stepped through the door in the engine room, wasn't it?

A. Is this the starboard one?

Q. Yes, the starboard one.

A. Do you mean the motor right in front of  
517 the door?

Q. Yes.

A. That is the starboard motor, the first one.

Q. Now, when you come through the door in the engine room the first motor you see is the starboard motor?

A. Yes.

Q. And the exhaust pipe was between where the starboard was located and the entrance to the door, wasn't it? You tell me where the starboard port pipe was with reference to the door and the starboard engine.

A. Where this piece was (indicating)?

Q. Yes.

A. This goes on the back of the motor.

Q. All right, suppose you hold it and tell me how it hooked on to where it was supposed to connect with relation to the door of the engine room.

A. This pipe is fastened right onto the manifold of the motor, just like this, and this comes out and is fastened onto the pipe that went out the stern of the boat. This is the starboard exhaust pipe. That other part there is the port exhaust pipe.

Q. Where would the door be that you came into the engine room from—

A. Relative to the position of this pipe (indicating)?

Q. Yes.

A. It would be about seven feet.



Q. In which direction?

A. Right straight ahead.

518 Q. Could you come into the engine room and look at these motors without seeing that starboard pipe which you are holding here, Exhibit No. 1?

A. When we are handling motors and everything we stand right back here (indicating).

Q. Was this patch on this starboard motor during all of these times?

A. What times?

Q. All of the times that you were chief engineer on that boat.

A. No, sir, not all of them.

Q. Was this hole in this exhaust pipe patched in some fashion or other on the outside during all of the time you were chief engineer on the Friendship II?

A. It is possible that there were some patches on it.

Mr. Parmer:

I move to strike the answer on the ground that it is not quite responsive to the question.

Mr. Mershon:

If you can get an answer that is responsive, I will appreciate it.

The Court:

Let's proceed. The motion to strike is denied. That is a matter of re-direct examination.

(By Mr. Mershon):

Q. You stated that after these children were overcome by gas in the after-stateroom in September, 1935, that you were ordered to check the exhaust pipes. Who gave you those orders?

519 A. Mr. Yeiser or the Captain one; I don't know which; I always did what the Captain told me to.

Q. You say Mr. Yeiser did not order you to do it or do you say he did?

A. Probably not directly but indirectly.

Q. Do you remember at all, Chief, whether Mr. Yeiser ordered you or not?

A. Not positively; I don't know whether he did or didn't.

Q. You don't know whether it was Mr. Yeiser or Captain Roberts?

A. No, sir.

Q. Were you in Miami or Fort Myers when you made that inspection in pursuance of those orders?

A. We were somewhere between here and Fort Myers; I don't remember the location of where we were at.

Q. Did you get the orders immediately upon finding the children overcome by this gas?

A. Within that day probably, yes.

Q. Did you make the inspection within that day?

A. Either that day or the next.

Q. You don't know whether you made it while you were in port or while en route?

A. No, sir, or laying at anchor.

Q. Since you have been engineer on that boat has anyone else been overcome to your knowledge by this carbon monoxide gas, either overcome or affected by it?

A. Not so bad; I don't know of anyone, no.

Q. Well, has anyone else been affected to any extent at all by it to your knowledge?

A. Well, it was just understood on the boat  
520 that in that room—of course this is not the question you asked me—it was understood on that boat that after that when we ran the boat that it was necessary for us to keep these windows closed, and that was all the crew and every one of us sailors; every one of us knew to keep those windows closed, but it was done from these boys falling like they did.

Q. Mr. Yeiser ordered it done?

A. Yes, sir; when there was anyone sleeping in there at all and we were running they were ordered that the back windows be shut.

Q. Now, Chief, will you please answer directly and positively my former question: whether anyone to your knowledge on that boat, Friendship II, was affected slightly or otherwise by exhaust gases during the time you were on her as engineer, including yourself?

A. Yes, sir.

Q. Now, who was affected?

A. Well, Captain Johnson and myself.

Q. Who is Captain Johnson?

A. He is a fishing guide.

Q. Both he and you were affected by gas from the exhaust on that boat?

A. Just slightly.

Q. Do you know of anyone else?

A. No, sir.

Q. Now, Chief, if you do not remember where  
521 you made this inspection of the exhaust pipes after Mr. Yeiser's children were overcome, do you remember the details of the inspection that you made and what you did?

A. Just what we could see with our eyes and sounding with a small hammer, and using a light all the way through it; we had a good light.

Q. Do you mean a flashlight?

A. I didn't take the wrapping off or anything from the pipe, that is, this asbestos or anything like that.

Q. Did you go below and lay out on the floor of the bilge?

A. No, sir.

Q. And look up?

A. No, sir. But you could stick your head down and see the pipes all the way through; you could see them from one end to the other, that is, from the bulkhead back to where they came up through—

Q. When was the tape, the present tape, as it now appears on the starboard exhaust pipe, Exhibit 1, placed there?

A. I couldn't say.

Q. Did you put it on there?

A. Yes, I put it on there.

Q. Will you please illustrate how that pipe connected with the engine and what part of it, if any, rested upon or toward the floor?

A. That part (indicating).

Q. How far was the taped part of the pipe  
522 above the floor of the engine room?

A. This piece (indicating) was right above the floor, and this was open right back behind there, and you could see on back a little bit further than this here (indicating).

Q. Well, now, did you know that this tape had split and was open all the way through under the bottom of that pipe at any time?

A. Well, if it did, we would just replace it, which would stop this water coming out of that.

Q. You would wait until you saw water coming out and then you would undertake to retape it?

A. Yes.

Q. Would you just put more tape on top of the old tape, or take the old tape off and put on a new tape?

A. Put more tape on.

Q. You mean by that that the water would come out of the exhaust pipe and leak through the tape and when it reached that stage you would put new tape on?

A. If it run out, yes.

Q. You stated that you had been in rooms where exhaust pipes were leaking. Will you tell us when and where that was?

A. In the engine rooms.

Q. On what boats?

A. This one here and I believe on quite a few; I just don't recall which ones.

Q. Now, Chief, you stated that the Friendship  
523 II had done quite a bit of running about between September 1, 1935, and March 2, 1936. I will ask you when the Friendship II came over to Miami prior to March 2, 1936; when did you come over from Fort Myers?

A. You mean after the 1st of September?

Q. Yes.

A. Probably the last of September, or the 1st of October we got in to Miami.

Q. Didn't the Friendship II stay in Miami then from practically October 1 to March 1, 1936?

A. No; we had been back to Fort Myers during the time, and also down on the Keys and cruising around.

Q. In January and February, 1936, where was the Friendship II?

A. Sometimes it was in Fort Myers and sometimes it would be between Miami and Fort Myers. I know that in January we were in Fort Myers.

Q. How long had the Friendship II been in Miami prior to this trip on February 28, 1936?

A. You mean tied up to the dock or—

Q. I mean, porting here or being here, basing here or docking here, or whatever you might term it?

A. Probably a month, I would say; we checked in and out all through the winter, and we would come in and get supplies and things, and go out again on a trip and then we would come back. I don't know just the dates and the periods of time that we stayed at one place.

Q. What is the longest that the Friendship II  
524 would remain either tied up at the Royal Palm Dock or anchored out in the bay or tied up—in other words, what would be the longest she would be in any one of these positions at one time?



A. I don't believe we stayed in port two weeks at any one time.

Q. What was the condition of the bottom of the Friendship II?

Mr. Parmer:  
When?

Mr. Mershon:

During the whole period of September 1 to March 2, 1936.

A. Good.

Q. She did not leak a drop, did she?

A. She leaked a drop, but she wasn't considered a leaky boat.

Q. Did she leak any?

A. Very little.

Q. What was the condition of her stuffing-boxes during that same period?

A. You mean the propeller stuffing-boxes or—

Q. All of them.

A. They were not leaking.

Q. They were not leaking?

A. No, sir.

Q. Where did the water that got in the bilge come from?

A. Well, operating the water tanks would let a little bit get in; it never had very much in it.

Q. I believe you stated you pumped it out about every two weeks?

A. We kept it right down as low as we could  
525 get it down. The bilge was V-shaped and you would have a little water in there, but we had an electric pump there and it wasn't any trouble to pump it out. We just pumped it, until it looked like there wasn't anything to pump out; in fact, it was necessary to keep the bilge clean or it should have been that way;

the water would get stale in there and it would get to smelling bad—

Q. Water out of the exhaust pipe, mixed with carbon monoxide and other gases, smells bad?

Mr. Parmer:

I submit that that is a question for the chemist.

The Court:

I think it is proper cross examination. The objection is overruled.

A. You mean for me to describe the smell of the water?

Q. Well, all right.

A. It would just seem like it was kind of old in there, got "sourish".

Q. Don't you know, Chief, that that water in the bilge would come from the hole in the exhaust pipe that you and Roderick later discovered on the morning of March 2, 1936?

A. No, sir.

Q. Do you say positively that it did not?

A. There was nothing that you could tell that there was any water that came in from that.

Q. You mean by that that it did not come from that leak?

A. There was a little coming out of it.

Q. Coming out of the leak in the port exhaust pipe?

A. Yes, sir.

Q. How do you account for that increasing  
526 water in your bilge, when your stuffing-boxes were all tight and not leaking and that hole also in good shape and not leaking?

Mr. Parmer:

I object to the question because it assumes something that has not been shown. He has asked the witness

about "increasing" the water; there is no evidence of that at all. The Chief said just the opposite.

The Court:

I think the objection is well taken.

Mr. Mershon:

I will withdraw the question.

Q. Why was it necessary for you to pump the bilges every two weeks?

A. It wasn't necessary unless we had water in there.

Q. Did you have it in there?

A. Sometimes a little bit.

Q. How much?

A. Any time we could see it needed pumping I pumped it out.

Q. Whether it was two weeks or not?

A. Sometimes it would run the whole summer and never have to pump it out.

Q. Did you ever pump it less than two weeks' intervals?

A. I would say a lot of times when we were filling our water-tanks we would let that hose run over in the bilge and that would cause fresh water in there, and that would be pumped out, so as to keep your bilges clean and keep them from smelling.

Q. Whose duty was it to watch the bilge and pump the bilge out?

A. Mine.

Q. Did the bulkhead between the engine room and the dining room go right on down to the floor of the boat, to the bottom of the boat?

A. Yes, the beams.

Q. Did that bulkhead prevent the water coming in the bilge from the after-part of the boat going on down to the fore-part of the boat into the engine room and forward?

A. No, sir.

Q. Water could flow back and forth under that bulkhead, the engine room bulkhead?

A. Yes.

Q. Chief, will you state directly and positively whether at regular periods water accumulated in that bilge when this boat was actually operating?

A. No, sir; when standing still or running we didn't take any water in our bilge.

Q. Was there any water in the bilge when you and Mr. Roderick examined the exhaust pipes and found leaks on the morning of March 2, 1936?

A. A little bit, yes.

Q. Where did that come from?

A. Just a certain amount of water, but you can pump it out—

Q. Just a minute—do you say that no part of that water which you and Mr. Roderick found in the bilge came from the hole in the port exhaust pipe?

A. Probably some, yes.

Q. Where did the rest of it come from?

528 A. There was so little I can't say just where it came from.

Q. Had you pumped the bilge on that three and a half-day trip?

A. No, sir.

Q. You did not touch the pump?

A. No, sir.

Q. Do you recall in the month of October, 1936, a Mr. Worth Monroe, of Miami, Florida, coming over to Fort Myers and going aboard the Friendship II where she was tied up at the Riverside Dock for the purpose of examining the exhaust pipes?

A. Yes, sir.

Q. Isn't it a fact that Mr. Monroe in your presence looked down and saw some water in the bilge and asked you if there were any leaks in the bottom of the boat?

A. I don't recall the conversation.

Q. Isn't it a further fact that he not only asked you that, but didn't you reply to him, "No, she is very tight and doesn't leak a drop in the hull, and the water you see there came from a hole in the exhaust line", or words to that effect?

A. I can't remember the conversation or just what was said about it.

Q. Do you deny that?

A. I know there was a little water that came out of the exhaust pipe.

Q. Do you deny that on that occasion, at that place and time, you told Mr. Monroe the words that I just asked you about?

A. Do I deny it?

Q. Yes.

A. No, sir.

529 Q. Do you deny that you said that?

A. No, sir; I might have said that.

Q. Do you admit that you said it?

A. I might have; I don't remember.

Q. Who asked Mr. Roderick to come down and look for leaks in the exhaust pipes on March 2, 1936?

Mr. Parmer:

I object to that question; nobody has testified that Mr. Roderick was asked to come down there and look for leaks in the exhaust pipe. Mr. Roderick testified that he came down there to figure on putting in the exhaust pipe so it would run up the stack.

Mr. Mershon:

I object to the lawyer testifying for the benefit of this witness. I will withdraw the question.

(By Mr. Mershon):

Q. Who asked Mr. Roderick to come aboard on March 2, 1936?



A. I suppose that I did.

Q. For what purpose?

A. I usually—

Q. For what purpose did you ask him to come aboard?

A. It was to figure on putting new exhaust pipes in there.

Q. You did not ask him to come aboard to look for leaks in the present exhaust pipes?

A. Not when he first came down, but after we  
530 got to looking at them, then we decided to go ahead and find out the trouble with these pipes.

Q. Did you ask Mr. Roderick to look for leaks in the exhaust pipe on that occasion?

A. Yes, sir.

Q. Then you did ask Mr. Roderick to look for leaks?

A. Yes, sir.

Q. Who ordered you to ask Mr. Roderick to look for leaks in the exhaust pipes?

A. Mr. Yeiser.

Q. What is the normal average depth of water in the bilge at the lowest place after you get through pumping her out?

A. Well, there are three different compartments.

Q. Let's take the very deepest one.

A. The one where we always make the inspection?

Q. Yes.

A. Well, there is about four inches right down in the deep part of it, three or four inches.

Q. About four inches?

A. Yes, sir.

Q. About four inches?

A. Yes, sir.

Q. How much square feet of surface does that area cover?

A. That would be about four inches in the bottom and by the time it got out right under the fly-wheels of

the motors it would probably spread out to two and a half feet wide.

Q. How long would it be?

A. How long?

Q. Yes.

531 A. It would taper out and it would gradually run to nothing before you got to the stern of the boat.

Q. I mean these four inches, which is the deepest point you are talking about.

A. Yes, right under the fly-wheel.

Q. That is the deepest part in the bilge?

A. No, the deepest part would be up in the bow.

Q. This morning of March 2, 1936, when you and Mr. Roderick looked for leaks and found this leak in the exhaust pipe, how much water did you say you found in the engine room or in the engine room under the fly-wheels in the bilge; how much depth?

A. I would say about four inches.

Q. In other words, four inches was as low as you got it after you pumped the bilges?

A. Yes.

Q. And you found only four inches in the bilge when you found the leaks?

A. I didn't measure it, but there was no cause to pump it out.

Q. You had taken a week-end trip of 30 miles down the bay and 30 miles back, during which time you had not pumped the bilges, and during which time there was a leak in the exhaust pipe which was spurting water into the bilges, and you say no water accumulated in the bilges since you pumped it the last time?

A. I don't remember that.

532 Q. Now what kind of inspections did you make after these children were overcome on that boat in September, 1935, checking up periodically

or otherwise on the exhaust pipes in the Friendship II; what would you do in the way of inspections?

A. First, may I ask you something?

Q. Yes.

A. Do you mean when we made the inspection after that or the inspections all along?

Q. The inspections all along after that September, 1935, inspection.

A. There was only one very thorough inspection made of the exhaust pipe and that was right after these boys were found that way.

Q. That was in September, 1935?

A. The latter part of September; I don't know the date, however, but there were periods in there when I was in there looking all around, and I would naturally look for anything I could find.

Q. You made no attempt to make regular inspections of the exhaust pipes?

A. Not a direct inspection, no, sir.

Q. But you did raise the hatch and oiled your propeller bearings?

A. I oiled the propeller shaft bearings, and in doing that I would just look down in there where they are, and I didn't give the pipes a thorough inspection.

Q. You made no effort at all to look at the exhaust pipes separate from your propeller bearings?

A. Well, I would look for everything, but not especially the exhaust pipes.

Q. You did not make any inspection of the exhaust pipes, that is, tap on them and look at them?

A. You could see to that extent, yes.

Q. You didn't single them out and look for leaks?

A. Not all along, no, sir.

Q. What did you do between September and when you made the so-called thorough inspection on March 2, when you and Mr. Roderick went down there and made the inspection of the exhaust pipes, looking for leaks?

A. After this trip?

Q. Only after this trip when the ladies were brought out unconscious.

A. Yes; sir.

Q. You did not mean to say then on your direct examination that you oiled those propeller bearings once a month and that you did that regularly, and that once a month at the same time you did make an inspection of the exhaust pipes looking for leaks in the pipes. You didn't mean to say that?

Mr. Parmer:

I object to the question on the ground that—

Mr. Mershon:

I will withdraw the question.

(By Mr. Mershon):

Q. Now what time of the day did Mr. Yeiser tell you to go down and get Mr. Roderick to come aboard the Friendship II on that day that Roderick came down and you and he looked over these exhaust pipes; what time of the day had Mr. Yeiser told you to go down there and get Roderick?

A. I don't remember.

534 Q. Do you remember that Roderick made a trip and came over and inspected the pipes with you, and that he came back the next day and put the patches on; do you remember that?

A. He put the patches on when he made the inspection; he went and got the stuff and came right back and put it on there.

Q. Do you deny or do you say that Mr. Roderick only came aboard on one day; do you say that he only came one day?

A. He came there at different times, two or three times. We were having a lot of trouble right at that time; there was a lot of confusion going on.

Q. Was it the day that the ladies were brought out unconscious that Roderick came aboard and made this inspection with you for leaks?

A. I think it was; I won't be positive.

Q. If Mr. Roderick says that he made the inspection with you on that day, and he came back the next day and put the patches on, is Mr. Roderick right or is he wrong?

A. By the way, Mr. Roderick came down there to put the patch on, but we didn't start up these motors and patch it right then, but that same day he came back and put the hose and the clamps on there. I never stood back there when he was doing it.

Q. That was the same day and not the next day after the ladies were hurt that Mr. Roderick put the clamps on the pipe?

A. It wasn't the same day; I don't think it was the same day to the best of my memory.

Q. Was it the next day; if Mr. Roderick says it was the next day—

A. It has been a long time ago and I don't remember; if it had been brought up sooner—

Q. You did not have time to get prepared on that?

A. Pardon me?

Q. You have not had time to get prepared on that question; would you want to check up on it and come back and answer it definitely?

A. I did the best I could to answer it now.

The Court:

What do you have to check up on, if you cannot remember it; have you any record to check with?

The Witness:

No. All of the bills for that work that was done were sent to Cincinnati.



The Court:

Have you any records to check that up with?

The Witness:

No, sir.

(By Mr. Mershon):

Q. Had Mr. Yeiser had some work done on the Friendship II over at Fort Myers prior to this trip which ended on March 2, 1936; had he had some work done at the Fort Myers Boat Yard or at Loftin's Boat Yard?

A. That is where we dry-docked.

Q. Had he had some work done on the boat there?

A. Yes.

Q. Had he secured some estimates on the repairs to the exhaust pipes from Loftin's Boat Yard?

A. No, sir, not that I know of.

Q. Had he discussed with you the matter of replacing the exhaust pipes; had Mr. Yeiser discussed with you the matter of replacing the exhaust pipes in the Friendship II at any time prior to the injury to these young ladies on March 1-2, 1936?

A. Well, it was said several times that he would like to exchange the exhaust pipes on account of the trouble that he had had there; I mean on account of this gas, this smoke and things that was causing the trouble on the boat. Mr. Yeiser wanted everything in absolutely first-class shape.

Q. Did he ever instruct you to get estimates for changing these exhaust pipes for any reason?

A. Mr. Yeiser?

Q. Yes.

A. No, sir.

Q. He never did that?

A. No, sir.

Q. Did he discuss with you the changing of the exhaust pipes and replacing these pipes prior to the time the young ladies were injured?

A. Not that I remember directly.

Q. What do you mean by "directly"?

A. I mean directly; there were just a few remarks made, something said about the exhaust pipes; many times he would drop in and say something about the pipes; he talked about raising them up through the stack; in that respect it had been talked about, but after this accident with the girls that is when he was desirous of having something done, and that was why Mr. Roderick came aboard.

Q. Were there any instruments in the engine  
537 room by which you could test the depth of the water in the bilge of the boat, the Friendship II?

A. I always had a crank lever there about three and a half feet long; it was just a piece of iron with a handle on it, and I would just reach down through the hole and sound with that.

Q. One more question and I will be through: When these tests were made over in Fort Myers where you held the hose to the port exhaust pipe, was there any water in the bilge under the place where you were holding the hose against the exhaust pipe?

A. Very little. We run it for two hours and twenty minutes and the water was running out of it all of the time then and that was getting into the bilge; that was when we made the test. We made the test with the hose after we run the engine for two hours, so there was a little water down there.

Q. Did you have to squeeze that hose pretty hard under that leak in order to get sufficient grip to pull it against the exhaust pipe?

A. No, sir, the hose was fit; I didn't have to squeeze it, because the hose I had was held tight up against the pipe.

Q. You just held it with one hand?

A. Probably with both of them; I would hold it with one hand and then the other; it was kind of hard to hold it.

Q. Did you change hands?

A. No, sir.

Q. You don't know whether you used one  
538 hand or both hands?

A. Probably used both of them at times. The hose wasn't so big; it was just clamped along up there, mashed it up there around this pipe.

Q. Chief, I am not trying to embarrass you; I am trying to get you to tell me what you know, if you can do it. To the best of your knowledge please state whether you held the hose against that exhaust pipe with both hands all of the time during that test.

A. I believe I held it all of the time with my right hand.

Q. With your right hand?

A. I believe so, because I had my other hand bracing myself, because I was reaching over.

Q. You were in a strained position?

A. Yes.

Q. You were somewhat off balance?

A. No, but I couldn't stand up straight.

Q. I believe you said it seemed like ten minutes, when in fact it turned out to be only four.

Mr. Mershon:

That is all.

#### Re-Direct Examination.

By Mr. Parmer:

Q. On all of these occasions when Mr. Yeiser made remarks about changing the exhaust pipes, did he say in what way he wanted to change them?

A. Yes.

Q. Please tell us what he said in full.

A. He wanted them to go out through the top.

539 Mr. Mayne:  
Was this on every occasion?

Mr. Parmer:

I asked that question and I believe he answered it. Shall I ask him again?

Mr. Mayne:

I want to know whether this referred to all occasions or just once—just one specific occasion.

Mr. Parmer:

I will ask him.

(By Mr. Palmer):

Q. Mr. Blount, my question was on all of those occasions when Mr. Yeiser spoke about changing the exhaust pipes on the Friendship II, tell us what he said with regard to the change he wanted to make.

A. He wanted them to go out through the roof, out through the top, and we told him that it would destroy the deck-house, that the deck-house would have to be changed, and that was all that was said about it until the last time, then he says "they will have to go out through the top"; he said they would have to go out through the top regardless, and that it didn't make any difference, that they would have to be put out through the top.

Q. When Mr. Roderick came aboard the ship the first time did he make any measurements with the view of running these exhaust pipes out through the top?

A. I believe he did, yes.

Q. Did anybody else come aboard and make measurements for that purpose?

A. Yes.

Q. How many other people?

540 A. Two that I know of.

Q. Two others, you mean?

A. Yes, sir.

Q. Now at the time when Roderick came on board the vessel for the purpose of estimating on that work were you with him at that time, were you with him when he was making his measurements?

A. I was around there, I don't know whether I was right with him. We discussed it some, yes.

Q. Were there any difficulties in the way of running these pipes up through the stack?

A. Many of them.

Q. For instance?

A. Well, it interfered with that part of our dining room, and it interfered with going through the deck salon.

Q. In order to allow them to go out through the top would the exhaust pipes have to go through the deck salon?

Mr. Mayne:

I don't think it is material what Mr. Yeiser wanted to do after the accident; however, I will withdraw the objection.

Q. Now, Chief, you say that you had an experience yourself, along with someone else, in being affected with gas on the Friendship II?

A. Yes, sir.

Q. Will you tell us in your own words everything that happened at the time you were affected with gas, where you were and what happened, if you can?

A. Well, this fishing guide and myself had  
541 an ice-box just on the stern of the boat that we kept our bait in, and we wanted to take this bait and cut it up for trolling, and we went back there on the lower deck, right on the stern, and we went back there and we stood out there and cut up possibly a couple dozen of mullets, cut them up for bait for fishing—



Q. How long did that take?

A. Probably forty minutes or maybe an hour; both of us were working in a hurry. We were standing there and then we started to walk off and we felt kind of "weakish", like our legs didn't want to support us good, and after that we began to develop a little headache, both of us; both of us had the same headache, and that was all there was to it. We were right out in the open air, but there was no wind blowing.

Q. Are you acquainted with other boats of the type of the Friendship II in which the gas coming from the exhaust pipe will come in over the after-deck?

A. Only the ones that I had run like the old Friendship. Now her's used to come out on either side pretty well aft, and we had the same trouble with her.

Q. What would you have to do in order to prevent the gas from coming in where the people would be?

A. We run those exhaust pipes up through the stack.

Q. You changed the exhaust pipes on that boat?

A. Yes.

Q. Until you made that change what did you  
542 have to do in order to protect the people on the boat from the gas coming in there from the outside?

A. It was a larger boat and they would just move in different places. That is the way he wanted to fix the exhaust pipes on this other boat, the Friendship II.

Q. Did you ever hear Mr. Yeiser say anything which would indicate that he had any knowledge that these particular exhaust pipes on the Friendship II were defective in the sense that they had holes in them?

A. No, sir, he didn't think they had any holes in them.

Mr. Mayne:

That is objected to—

Mr. Parmer:

I will consent that it be stricken.

(By Mr. Parmer):

Q. I want to know whether Mr. Yeiser ever said anything to indicate that he knew the pipes had holes in them?

A. No, sir.

Mr. Mershon:

We object to that as being irrelevant and immaterial; there is no proof here that he didn't have knowledge.

The Court:

I will sustain the objection and the answer may be stricken. You can ask the witness along that line if Mr. Yeiser ever said anything about holes in the pipe.

Mr. Parmer:

Then there will be no objection to that?

Mr. Mayne:

We have not heard the question yet.

(By Mr. Parmer):

Q. Did Mr. Yeiser before March 2, 1936, ever say anything about holes in the pipes?

A. No, sir.

Q. Now, Mr. Blount, what ventilation did you  
543 have in the engine room on board the Friendship II?

A. It had a ventilator that went out through the top, went out through the top.

Q. When you say you had a ventilator, tell us what it was.

A. It was a box-affair from the room to the engine room; it was a funnel-shaped ventilator setting up on top of that.

Q. When you say "funnel" do you mean that it was sort of goose-necked?

A. Yes.

Q. That you could turn to the wind?

A. Yes, or turn it back.

Q. What else was there in the engine room to aid ventilation?

A. Windows that opened on the port side, and a door.

Q. Did you have a fan there?

A. Yes.

Q. What kind of fan was it?

A. A 16-inch oscillating fan.

Q. Now Chief, this is the starboard exhaust pipe; I think it is Exhibit No. 1. How long before March 2nd had you begun to put tape on that?

A. I don't know, sir.

Q. You can't remember?

A. No, sir.

Q. You can't remember?

A. No, sir.

Q. You say that this Exhibit 1, this part of  
544 the exhaust pipe was in back of the motor?

A. Yes, sir.

Q. Now you had two motors there, did you not?

A. Yes, sir.

Q. How did they run?

A. Fore and aft.

Q. Was there a space between each motor where you could walk?

A. Between the motors?

Q. Yes.

A. Yes, sir.

Q. How long was the motor from the place where this Exhibit 1 joined it to its other end?

A. From the place where Exhibit 1 joined onto the rear end of the motor, to the other end of the motor?

Q. Yes.

A. About seven feet, I would say.

Q. Seven feet?

A. No; to the other end of the motor it was about four and a half feet, and about seven feet to the door.

Q. Did the door enter into the engine room from a bulkhead which was on the side of the motor, or was it solid in back of the motor?

A. The door was in front of the motor.

Q. That is farther forward than the motor?

A. Yes, sir.

Q. And how wide was the motor?

A. I would say about twenty-four inches.

545 Q. Was this exhaust pipe, which is Exhibit 1, attached to the motor in the middle or to one side?

A. To the back end of it.

Q. Was it in the middle or more to one side?

A. No, it was on one side.

Q. Which side was it on, toward the side which was nearer the other motor or toward the side which was away from the other motor?

A. Away from the other motor.

Q. Whenever this part of the exhaust pipe, Exhibit No. 1, would start to leak how would you notice it?

A. Just by seeing it.

Q. By what?

A. Just by seeing it, and you could hear it.

Q. What would you see?

A. You could see water coming out of it.

Q. Where did the water go?

A. Right down the bilge.

Q. Was there an open space under this pipe leading to the pipe, or was there a flooring there?

A. There was a flooring there that came up on this part where it is green (indicating).

Q. Tell me if I understand you correctly: Was this part of Exhibit 1 that is covered by tape underneath the level of the engine room floor as it was attached to the motor?

A. Yes.

Q. By whom were you employed before you  
546 left Fort Myers to come to Miami to testify in this case?

A. The Lee County Land Company are the ones that the checks are made on, but it was the Collier Interests.

Q. What kind of work have you been doing?

A. Engineering.

Q. On a boat?

A. On a dredge.

Q. How long have you been employed by them?

A. About five months.

Q. Now that bilge pump which you had on board the ship, Mr. Blount, to what level would that drain the water from the bilge at the place where it was set?

A. Are you talking of this one right under the fly-wheels?

Q. Yes.

A. In the center of the boat there was a box-like screen made on the bottom of it to keep sand from getting into the pump, and when you got that down to about three and a half inches right at that spot—

Q. When you brought it beyond three and a half inches what would it do?

A. It would pull air.

Q. I think that in your answers to some of Mr. Mer-shon's questions you said that Roderick came on board several times; is that correct?

A. Yes.

Q. Do you remember whether those several  
547 times to which you referred were on separate days?

A. Yes.



Q. Which were they, on separate days or on the same day?

A. Pertaining to the pipes?

Q. I don't care what it was pertaining to.

A. After we came in there for three or four days or maybe more, he was down there at different times; he came and went any number of times, and just what was done each time I don't remember; that was after we came in from this trip.

Q. Now, Chief, I will show you a book. I want you to tell me if you recognize it and if you do, tell the Court what it is.

A. Yes.

Q. What is it?

A. It is a log-book, that is what we call a log-book.

Mr. Mershon:

If Your Honor please, we object to the question as not being proper re-direct examination.

The Court:

I think the objection is well taken, if you are going to introduce the log-book.

Mr. Parmer:

I am ~~not~~ going to introduce it. I am going to have him refresh his recollection in regard to where the boat went on all of these different times that Mr. Mershon has been asking him about. Mr. Mershon tried to test his recollection with regard to all of these places, and I am trying to find out more definitely now where this boat was occupied in going.

548 The Court:

Well, it may be re-direct examination on that basis. Why don't you just offer the book?

Mr. Mershon:

Did he make the entries in the book?

The Court:

If it is the log of the vessel, why not offer the whole log?

Mr. Parmer:

I am perfectly willing.

Mr. Mershon:

If counsel will permit me to examine it, Your Honor, we might shorten it up.

Mr. Parmer:

If the witness will say it is the log book and that it was kept in his handwriting, I will offer it in evidence.

Mr. Mershon:

We have no objection to him qualifying him, to see if he made the entries. Go ahead.

(By Mr. Parmer):

Q. What is this, Chief?

A. It is a log-book.

Q. Of what vessel?

A. Of the yacht Friendship II.

Q. Between what periods?

A. Between the 1st day of January up until she was laid up.

The Court:

What year?

The Witness:

1936.

The Court:

It does not cover the period from September, 1935, to January, 1936?

The Witness:

No, sir.

The Court:

Neither does it cover the period from May, 1934, until September, 1935?

The Witness:

No, sir.

549 Mr. Parmer:

It only covers a part of the period, Your Honor.

The Court:

Then I don't know whether that would be re-direct or not.

Mr. Mershon:

Maybe counsel would like to produce the entire log and let us see the whole thing; and then we will get along.

Mr. Parmer:

I will explain its absence, but at the present time all I have is this log-book, and that covers part of the matters concerning which Mr. Mershon was inquiring. I submit I am correct in the manner in which I am proceeding, but if Mr. Mershon wishes me to offer it in evidence—

The Court:

You may proceed with the examination.

(By Mr. Parmer):

Q. Are the entries in your handwriting, Mr. Blount?

A. Yes, sir.

Q. All of the entries?

A. Every one.

Q. Were these entries made by you as the result of your personal knowledge of the events which you endeavored to record in that log-book?

A. Yes, sir.

Q. That is, your knowledge with regard to the places you were and the times that you started and the times you got to other places?

A. Yes, sir.

550 Mr. Mershon:

May I ask him a question on that?

Mr. Parmer:

Yes.

(By Mr. Mershon):

Q. Was it your duty to keep that record?

A. Yes, sir.

Q. Were you instructed by Mr. Yeiser to keep it?

A. This is not a complete log-book; it is just a running-log.

Q. Was that kept in the engine room or in the pilot house?

A. That was kept in the engine room, or right there at it.

Mr. Mershon:

I would like to see it if I may.

Mr. Parmer:

Do you want to see it before I offer it in evidence or before I inquire of the witness or what?

Mr. Mershon:.

Let me see it before you offer it in evidence.

The Court:

I think it would be proper re-direct examination to use the log all during the time which was covered by Mr. Mershon's examination, but it will aid the witness only in refreshing his memory as to that part of the time. I suppose it is competent for that purpose. You might ask him to look at it to refresh his memory covering the entries that he made from that time, from January to March.

Mr. Parmer:

I have two ways; I can ask him to read all of this into the record or offer it in evidence.

Mr. Mayne:

Let us see it and maybe we can save some time.

Mr. Parmer:

All right.

(By Mr. Parmer):

Q. I wish you would look at the log-book and use it for the purpose of refreshing your recollection and tell us where the Friendship II went from January 1, 1936, until March 2, 1936, and the dates on which she went to each place and the time that she left on this trip which began on February 28th, and the time that she started from Featherbed Shoals on March 2, 1936, and the time she returned to the dock in Miami on the same day.

Mr. Mershon:

We object to that upon the ground that it is not proper re-direct examination; secondly, the log appears to have



been only a private record and is incomplete, and it has not been shown that there is any other complete shipment log concerning the entire period as to which the witness testified; third, it is in the nature of a self-serving recital by the witness; fourth, it does not appear that the witness by looking at the log could recite the information therein contained of his own knowledge; fifth, an inspection of the log by the Court will disclose that it is incorrect on its face and does not recite matters which this witness has testified happened on certain dates; that on its face it is incorrect and unreliable, and the witness has already testified that the ship's log is in existence.

The Court:

Is that a fact that he testified to?

Mr. Mershon:

I will ask him.

(By Mr. Mershon):

Q. Was there another log kept on board the Friendship II?

A. Yes, sir.

Q. Did Captain Roberts keep the log?

A. That is his property.

552 Mr. Parmer:

What is it?

The Witness:

The log of the ship.

(By Mr. Mershon):

Q. Did Captain Roberts keep a log for that ship?

A. I won't say.

Q. Was there another log besides this one kept aboard the Friendship II while you were making this record?

A. No.

Q. Was there any log on the Friendship II kept there aboard?

A. No, sir.

Q. Captain Roberts didn't make any record in the nature of a log on the Friendship II?

A. No, sir.

Q. Did he make any record in the nature of a log which he kept for his own personal individual use?

A. No, sir.

Q. Is this the only log that was kept of any kind for the Friendship II during the period from January 1 to the dates therein shown?

A. Yes, sir.

Q. Was there any log kept from September 1, 1935, up to January 1, 1936?

A. Yes, sir.

Q. Who was that kept by?

A. By me.

Q. Where is that?

A. I couldn't say.

553 The Court:

What was it you had reference to when you said something was kept by Captain Roberts?

The Witness:

Well, it was kept by him as a private log, in order to make any report that we might need for accidents or for insurance purposes; that is practically what the log is kept for.

The Court:

Let me ask him this: Did you keep—whether you called it a log or not—a record similar to this for the period of 1935—

The Witness:

Yes, sir.

The Court:

Do you know where that is?

The Witness:

No, sir.

The Court:

When was it last in your possession?

The Witness:

It was always on the boat, and when the boat was sold some of these things were done away with; I guess the Captain took it; it wasn't mine.

The Court:

The other instrument; whether they called it a log or not—did Captain Roberts keep some record of the movements of the vessel?

The Witness:

Only through that.

The Court:

Through what?

The Witness:

This book.

The Court:

The one that you kept?

The Witness:

Yes, sir.

The Court:

He didn't keep one himself?

554 The Witness:

No, sir.

The Court:

Well, have you looked over this book since it has been handed you by Mr. Parmer on the stand?

The Witness:

I just looked at some of the writing in it; I didn't look through it entirely, no, sir.

The Court:

Well, from what you looked over do you want to change any of your testimony about what movements were made from January 1 to March 2, 1936?

The Witness:

No, sir.

The Court:

That book won't serve to refresh your memory or cause you to change anything that you said?

The Witness:

I don't think so, no, sir.

The Court:

Will by looking over that book help you to make more complete any answers that you have heretofore given as to the movements of the boat from January 1 to March 2, 1936?

The Witness:

It would give us exactly where the boat was at all times from the 1st of January up to this time.

The Court:

You mean it would refresh your memory and give a more complete statement of the movements of the boat?

The Witness:

I don't know whether I could recite the dates and the times off, but—

The Court:

If you looked at it would it refresh your memory to make a statement?

The Witness:

Yes, I believe it would if I would be allowed to make notes of it.

555 The Court:

Well, when did you make the entries in that book?

The Witness:

Well, I had little pads that I kept on the boat, and I would take the notes off of the pads and put them into the book.

The Court:

When did you put them in the book?

The Witness:

Nearly every day, or every few days.

The Court:

Where are the pads; did you destroy them?

The Witness:

Yes, I guess so.



The Court:

Well, I will sustain the objection. I do not think this is re-direct examination.

Mr. Parmer:

Does Your Honor sustain the objection merely on the ground that I may not make this inquiry on re-direct examination, or on the other ground that I may not refresh the witness' recollection with respect to matters brought out on Mr. Mershon's cross examination?

The Court:

The question covered not only the movements of the vessel collaterally, and when I say "collaterally" I mean other than the trip in question, beginning on March 28th, but you embrace in your question the general movements of the vessel on other occasions.

(Legal argument.)

The Court:

I will sustain the objection, and you can reframe your question.

(By Mr. Parmer):

Q. Mr. Blount, will you take this log-book and look at it and use it to refresh your recollection, and will you tell us where the boat went from January 1 until  
556 February 28, 1936, the places at which she was on the different dates and to which she went on the various trips she made, and the times that the trips began and the times that the trips ended; in other words, give the movements of the vessel between January 1 and February 28?

Mr. Mershon:

We interpose the same objections that we interposed before.

The Court:

Well, the objection will be overruled. You may answer the question.

(By Mr. Parmer):

Q. Will you answer the question, sir, that is, if you can remember it and understand it...

A. I can't remember it at all.

The Court:

You can take the book and refresh your memory and if you want to tell us in more detail, with your memory refreshed by the memorandum there, then you can do so.

The Witness:

As I to take the book?

The Court:

Just look at it; use it to refresh your memory. Look at the first entry there on January 1.

The Witness:

On January 1st we left Miami, Florida; we had docked at 7:30 and we arrived at Angelfish Creek at 12:00 P. M.

The Court:

Do you remember that you did that that day; do you have any independent recollection now of that, since your memory has been refreshed; do you have an independent recollection that you did make that trip?

557 The Witness:

No, sir. I lived on the boat and—

Mr. Mershon:

May I ask the witness two or three questions before we adjourn?

The Court:  
All right.

(By Mr. Mershon):

Q. You were asked about the motors in the engine room and about this starboard exhaust pipe, Claimants' Exhibit No. 1, and you were asked about the space that existed around the motors and the exhaust pipe where you could walk around them. Is it not a fact that there was a space on all sides of each motor where you could walk around and look over the motors?

A. No, sir.

Q. Where was there any space that you could walk over and around those motors?

A. On the starboard engine you could walk alongside of it.

Q. You couldn't walk on the starboard side of the starboard engine?

A. No, sir.

Q. But you could walk between the engines back to this patch on this starboard exhaust pipe, couldn't you?

A. Practically to the patch.

Q. And standing between the two engines this patch on the starboard exhaust pipe, Exhibit No. 1, was plainly visible, wasn't it?

A. Yes, you could see it.

Q. Now, what was it, Mr. Blount, you said  
558 about what Mr. Yeiser said to you about changing the exhaust pipes the morning the young ladies were hurt; what did he say about that?

A. He said that the exhaust pipes must go out through the top.

Q. What reason did he give for that on that morning, as you expressed it on your direct examination?

A. I suppose it was on account of this accident.

Q. What accident?

A. This case we are trying here right now.

Q. I mean what accident did he refer to as the reason why the exhaust pipes must go out, meaning Mr. Yeiser?

A. Will you have him repeat that question for me?

Q. I will withdraw that question. What were Mr. Yeiser's words to you, in his own words, as the reason why he told you that these exhaust pipes must go out, the present exhaust pipes must come out, and the exhaust pipes must go up through the stack; what was the reason in Mr. Yeiser's words for doing that with the exhaust pipes?

A. He gave me a direct order.

Q. What reason did Mr. Yeiser give you, if any, for deciding right then that the exhaust pipes must go up the stack?

A. Mr. Yeiser gave me a direct order to get somebody there to bid on that job to get them up through the top.

Q. What reason did he give you for having that done that day?

A. I suppose—

Q. Don't suppose.

A. I don't remember how that came about, 559 but it was said, if that will help.

Q. I think your lawyer helped more than you did. What was Mr. Yeiser's order to you; do you remember that?

A. To get someone to figure on putting the exhaust out through the roof; that they must go out through the roof.

Q. What did he say; what happened to the pipes as they were then in the bilge?

A. Mr. Yeiser said nothing about the bilge.

Q. He didn't say the pipes must come out of the bilge?

A. Yes, sir.

Q. And what reasons, if any, did he have for wanting them to come out of the bilge?

A. On account of these girls' sickness, I guess.

Q. Well, what was there about the girls' sickness that had anything in the world to do with the exhaust pipes, according to Mr. Yeiser?

Mr. Parmer:

That is a different question.

Mr. Mershon:

Well, according to what Mr. Yeiser said to him.

The Court:

Are you objecting to the question, Mr. Parmer?

Mr. Parmer:

Yes.

The Court:

State your objection in the record.

Mr. Parmer:

I object to that question on the ground that it does not ask the witness what Mr. Yeiser said, but it asks him to interpret what Mr. Yeiser said. He asked him what was there and what Mr. Yeiser said that would be a reason in view of the girls' condition for  
560 "doing something to these exhaust pipes below;  
he asked him to interpret what Mr. Yeiser said before we find out what he did say.

The Court:

Read the question.

(Thereupon the preceding question was read by the Reporter as above recorded.)



The Court:

The objection is sustained. You might ask the witness about what Mr. Yeiser said in connection with getting someone there and what Mr. Yeiser said about changing the pipes.

(By Mr. Mershon):

Q. What did Mr. Yeiser say to you about getting somebody there to change the pipes?

A. He gave me an order to get someone there to figure on putting the pipes out the top.

Q. What did he say to you as his reason for having that done that day?

A. I don't remember.

Q. Did he say to you or did he make any statement to you that it was necessary to change those pipes because of what had happened to the young ladies on that trip?

A. I can't remember of him saying anything about that to me; no, sir.

Q. He didn't mention the young ladies at all or the accident to them in connection with changing the exhaust pipes?

A. Not that I remember.

561 Q. Do you now say positively that he did not refer to the accident to the young ladies as the reason why those pipes must now be changed?

A. I don't remember the words that he used, but when he came there it was just a direct order to get someone there to put the exhaust pipes out through the top.

Q. What time of the day was it that he told you that?

A. It was sometime either on the 2nd of March—I believe it was the 2nd of March, the same day that we came in.

Q. In the morning or afternoon?

A. I don't remember.

Q. Was it after the young ladies were moved off of the boat, or either of them were moved?

A. I don't remember.

Q. You think it was during the day of March 2, but you don't know what time of the day?

A. Yes.

Q. Did you go immediately to see Mr. Roderick and ask him to come down?

A. I believe I used the phone.

Q. Did you do that immediately?

A. After he told me, yes.

The Court:

All right, we will suspend until tomorrow at 1:30.

562 Miami, Florida, October 9, 1937, 1:30 P. M.

Mr. Parmer:

I would like to recall Chief Blount.

The Court:

All right.

Thereupon CARL BLOUNT was recalled for further examination, and testified as follows:

Re-Direct Examination.

By Mr. Parmer:

Q. Mr. Blount, is this the log-book of the Friendship II kept by you from January 1, 1936, until March 2, 1936?

A. Yes, sir.

Q. It is?

A. Yes.

Q. Does it show the places at which the vessel was at various times?

Mr. Mershon:

We object to the question.

Mr. Parmer:

I will withdraw it.

Q. Tell us what the log shows?

Mr. Mershon:

We object to the question as the log itself is the best evidence. He might ask him what the log was kept for and what purpose.

Mr. Mayne:

It is all repetition.

563 The Court:

I think the record already shows what it was kept for.

Mr. Mershon:

Do I understand this is a brand new offer?

Mr. Parmer:

Yes. I now offer the log-book in evidence, but merely the parts of it which show where the vessel was at various times between January 1, 1936, and February 28, 1936, the places to which it went and the times at which it began these voyages and the times at which the voyages were ended.

Mr. Mershon:

We object to the offer, and before stating the grounds of our objection I would like to interrogate the witness.

The Court:  
All right.

By Mr. Mershon:

Q. Was that book a part of the records and equipment of the yacht 'Friendship II' itself or was it simply a private record that you kept for your own convenience?

The Court:  
Answer the question.

A. Well, it wasn't kept for my own convenience.

Q. Was it a part of the records and equipment of the boat itself?

A. It is not a part of the equipment of the boat.

Q. Is it a part of the records of the boat?

A. It is a record of our movements.

The Court:  
Who does it belong to?

The Witness:  
It belongs to the Captain.

(By Mr. Mershon):

Q. It did not belong to the boat?

A. No, sir.

Q. Could anyone inspecting the boat have  
564 seen that log without the Captain's personal consent?

A. No, sir.

Q. Did the Captain claim the right to take that log with him wherever he went on that boat, or off the boat?

A. Yes, sir.

Q. The Captain claimed that that was his own personal property, didn't he?

A. Yes, sir.

Mr. Mershon:

Now, if Your Honor please, we object to the introduction of any part of that book, because it does not appear on its face to be a log of the movements of the Friendship II or any other boat; second, the witness has testified that it is not an original entry; third, the witness has testified that these items were posted several days later from other memoranda; fourth, it is in the nature of a self-serving declaration on the part of the witness; fifth, the witness has testified that he has no independent recollection whatsoever of the matters therein set forth; sixth, it appears to be a record which was kept in the possession of the Captain, Captain Roberts, and not in the possession of the witness, and over which the witness has not had and does not now have the control; seventh, the witness has testified and it appears from the face of the instrument that it does not cover the full period of time from September, 1935, to March 2, 1936, about which the witness testified.

The Court:

Let me see the book.

565

Mr. Mershon:

And there is no showing of the accuracy of the entries; eighth, the witness has testified that he has no independent knowledge of the matters set forth, and he cannot therefore verify the accuracy or truth of the matters therein set forth. It has also been testified that there is another log or similar book or document which was in the possession of Captain Roberts which is necessary to complete this record so that it will include the dates about which the witness has testified. If this in-



strument is to be put in evidence covering a portion of the movements of the vessel; the entire instrument should be offered. I want to add the additional ground that it is shown upon its face to be inaccurate.

The Court:

Were all of these entries made by you in your own handwriting?

The Witness:

Yes, sir.

The Court:

What were the pads from which you copied this; were they written in pencil or ink?

The Witness:

With pencil.

The Court:

How long a time elapsed after the making of the pad entries before they were written in this book?

The Witness:

It varied, I suppose; I could not give you the exact time.

The Court:

What was your reason for writing them on the pads and then writing them in this book?

566 The Witness:

I had the pad in the engine room and that book was in our quarters, in my room on the boat.

The Court:

What was the usual practice with reference to transcribing the notes from the pads to this book, with reference to time?

The Witness:

The same as I have done there.

The Court:

You did not understand me. What was the usual practice with reference to when you would transfer your notes from the pencil memorandum to this ink memorandum?

The Witness:

Sometimes it was several days, and most usually there would be a few of them that I would put in that way, sometimes probably a week.

The Court:

The offer is made for the purpose of showing the movements of the boat and not with respect to any other entries?

The Witness:

May I add, Judge, that we didn't keep that for a running log-book, but the boat was insured and the movements of the boat had to be kept, because when we had any bills for any damages done to the boat we would have to give the correct time and place where these things occurred.

The Court:

Did the other record indicate the time of leaving and the time of arrival on trips?

The Witness:

Sure.

Mr. Parmer:

What record?

The Court:

The other record that he said was kept for the insurance company.

Mr. Parmer:

He said this one.

567 The Court:

No.

The Witness:

Yes.

The Court:

This was kept for that purpose?

The Witness:

Yes, sir.

The Court:

This was kept for the purpose of the insurance company record?

The Witness:

In case we had any collision or anything at sea, we had to present a bill to the insurance company.

The Court:

Was the book kept for the purpose of showing the time of leaving and the time of arrival on all trips?

The Witness:

Yes.

The Court:

How was the insurance company interested in that?

The Witness:

Because, whenever we had an accident; if we run into a submerged log and tore one of our propellers off, or some other boat run into us, we were supposed to give the location and time and where this was at.

The Court:

Did you put down in here a complete log of the boat, meaning a complete history of all of the trips it took during this period from January 1 to March 2, 1936?

The Witness:

Yes.

Mr. Mershon:

In view of the testimony of this witness, I would like to add an additional objection that the witness has testified that it wasn't a running log of the boat, but that it was a private record kept merely to advise the insurance company of any accidents that might have happened from time to time.

568 The Court:

Well, the ruling of the Court is that it is a memoranda, whether it measures to a log technically or not it is not necessary to decide. It is a memorandum kept by this witness in a sufficiently evidentiary manner to make it as admissible as showing the movements of the vessel at the times mentioned. It is admitted for that purpose only.

Mr. Mershon:

Can we have photostatic copies made of the portions in question, without offering the whole book?

Mr. Parmer:

I will agree to that.

(Thereupon the document above referred to was marked PETITIONER'S EXHIBIT No. 2.)

Mr. Parmer:

That is all.

Mr. Mershon:

With the Court's and counsel's permission we should like to have Mr. Blount sign his name on the first and second pages of this instrument for the purpose of identification and for possible comparison later of handwriting.

Mr. Parmer:

Sure.

569

Thereupon CAPTAIN FREDERICK ROBERTS was called as a witness in behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. Captain Roberts, where do you live?

A. Fort Meyers.

Q. Do you hold a Master's license for running steamships?

A. A Master Pilot's license.

Q. How long have you been going to sea in any capacity?

A. Well, I have the fifth issue on that.



Q. You will have to explain that to me; I do not know what that means.

A. Well, the fifth issue. You get a license for five years and you have to renew them.

Q. And you have been doing that for 25 years; is that right?

A. Yes, sir.

Q. Now were you formerly Captain of the Friendship II?

A. Yes, sir.

Q. When did you become Captain of that boat?

A. I don't know the exact date. It was in May, 1935, I think.

Q. You think it was 1935?

A. Yes.

Q. You think it was in May also?

A. Yes, sir.

Q. Well now were you Captain of that vessel  
570 in March, 1936?

A. Yes, sir.

Q. Were you Captain at the time that Mrs. Just and Miss Gruner and Mr. McKay and Mr. Yeiser went on this trip, which is the beginning of this lawsuit?

A. Yes, sir.

Q. Well now prior to going on that trip how long had the vessel been in Miami?

A. I would say about 18 or 19 days.

Q. Was Mr. Yeiser on the vessel at that time?

A. Yes, sir.

Q. Now at the beginning of that trip what was his physical condition?

A. It was very poor.

Mr. Mershon:

What period?

Mr. Parmer:

The beginning of that 18-day period.

Q. How long had he been on the boat at the beginning of that 18-day period?

A. Before you mean?

Q. Yes, before the 18-day period how long had he been on there?

A. Well, I would say about along Christmas time, sometime along there he went home and his family came down for about two weeks, the children and Mrs. Yeiser.

Q. During the time that he was on the vessel from September on did you observe his habits with reference to drinking? Did you?

A. I don't understand that.

Q. I say during the time from September on, September, 1935, onward up until March of 1936, did you observe his habits with respect to drinking intoxicating liquors? Did you observe them?

A. I guess the answer would be that I advised him all of the time to keep from drinking.

Q. But did you observe how much he drank and the way he drank? Answer that question yes or no?

A. Well, I would have an idea.

Q. What is that?

A. When he was drinking—

Q. No, Captain; you are on the witness-stand and you must answer the questions.

A. I don't understand that question about "observe".

Q. Did you see the way he drank?

A. Yes.

Q. What did you see about the way he drank?

A. Well, he would start drinking and would drink steadily for a 24-hour period, sometimes for two or three weeks; he would lay right in bed and couldn't get up.

Q. I believe you said you made every effort to keep him from drinking?

A. Yes.

Q. What did you do?

572 A. I went to Shark River and threw his whiskey overboard and kept the man thoroughly sober. I would get that man to the point where he didn't have any liquor or anything in him, and then we would go to West Palm Beach or Fort Meyers or Miami, and when he would get in here he would have quite a number of friends on board, and then he would get just as bad as ever again.

Q. When you came to Miami about 18 days before you went on this voyage had he been drunk and over it then?

A. Yes, sir.

Q. Was any medical treatment obtained for him when the vessel came to Miami?

A. Yes, sir.

Q. Who gave that medical treatment?

A. Dr. Howell.

Q. Now during that period, from the time that the vessel came to Miami and until she sailed on this trip on February 28th, did you observe any change in Mr. Yeiser's condition?

A. Very bad.

Q. You observed a change, did you?

A. Yes.

Q. Will you describe what that condition was, what the change was?

A. Well, he was feeling pretty bad; he was in—

573 Q. Did you notice a change with respect to the amount that he drank?

A. His whiskey was cut down as quick as the doctor came aboard.

Mr. Mershon:

I move to strike that as being a conclusion of the witness; also upon the ground that he is not competent

to testify to that; he has not been shown to be competent to testify as to the amount Mr. Yeiser drank.

The Court:

The objection is overruled. The motion is denied.

(By Mr. Parmer):

Q. Were you on the boat all of the time while the boat was in Miami?

A. Yes, sir.

Q. Were you in and out of his room from time to time?

A. Two or three or four times a day, and at nights, up until ten or eleven or twelve o'clock at night.

Q. Did you have any opportunity to see what he drank and how often he drank?

A. No; the nurse had taken charge of that as soon as she came aboard.

Q. You say he was in bed when you arrived in Miami?

A. Yes.

Q. Did he get out of bed?

A. When he did he went on the back deck, but someone had to help him get there.

Q. In what way did you have to help him?

A. Take hold of him and pull him up.

Q. Couldn't he walk himself?

A. No, sir.

Q. At any time before he went on this trip,  
574 which began on February 28th, was he able to walk?

A. He could pull himself around on the boat; he could catch hold of the rail and pull himself around on the boat; he was very strong in his arms and he could get hold of something to hold on to on the boat, but he couldn't go ashore and walk around on the streets.

Q. What I want to know is did he ever, before he went on this trip, get well enough so that he could walk around? Did he go ashore?

A. Before he went on this trip with the girls?

Q. Yes.

A. Yes, sir.

Q. He did go ashore before?

A. Yes, sir.

Q. Did you see him go ashore?

A. Yes, sir.

Q. And at that time what did you see?

A. One of the nurses taking him ashore and he walked just as straight as any man could walk and he went around Miami, and he called his people in Cincinnati on Thursday—

Q. That was Thursday?

A. Yes.

Mr. Mershon:

We move to strike what this witness says Mr. Yeiser did while he was ashore?

575 Mr. Parmer:

I will consent to that, everything that took place after Mr. Yeiser got out of this man's line of vision.

Mr. Mershon:

We realize that much of the witness' testimony is incompetent, irrelevant and immaterial, but in order to save time we will let the whole thing go before the Court, and unless it gets too bad we will continue to follow that suggestion.

The Court:

All right.



(By Mr. Parmer):

Q. When did you first learn that this trip was contemplated?

A. It was Thursday afternoon late, probably around eight o'clock.

Q. Did you speak to anyone with regard to the trip?

A. No one but the crew.

Q. Later on did you speak to any of the people who were going to go on the trip?

A. No, sir.

Q. Well now do you remember what time on February 28th you left Miami on the trip?

A. It was around 5:30.

Q. 5:30 in the afternoon?

A. Yes, sir.

Q. Now prior to leaving Miami did you obtain any supplies?

A. Yes, sir.

Q. What supplies did you obtain?

A. Groceries and four quarts of Gilby's gin.

576 Q. With whose money did you obtain that?

A. Mr. Yeiser's money.

Q. You kept that during the trip, did you?

A. What time it was kept I did; it wasn't kept so long.

Q. Did you give it out during the trip?

A. Yes, sir.

Q. Now were the members of the party Mr. Yeiser and Mr. McKay and Mrs. Just and Miss Grunow? Do you remember them?

A. Yes.

Q. Now did Mr. McKay say anything to you about going on that trip?

Mr. Mershon:

Now the time has come when I must object to him leading his witness. I object to that question because

it is leading and I move to strike the same on that ground.

Mr. Parmer:

I will consent. Very well, I will desist from any leading questions and will take the time necessary to do it otherwise.

Q. Now where did the vessel proceed after leaving Miami?

A. Featherbed Shoals.

Q. How long did it remain there?

A. Until the next morning.

Q. I might first ask you what time it arrived at Featherbed Shoals, if you can remember?

A. I would say somewhere around eight or  
577 eight-thirty.

Q. What time did you leave Featherbed Shoals?

A. Six-thirty the next morning.

Q. And where did you go?

A. I went down to what I call Card Sound Cut.

Q. How long did that take you?

A. That taken me, as best I remember, about one hour and twenty minutes.

Q. What did you do when you got there?

A. Anchored.

Q. How long did you remain there?

A. I remained there until Sunday night about 7:10 or 7:15, somewhere in there.

Q. What did you do on Sunday night?

A. I went down to Featherbed Shoals.

Q. When you got to Featherbed Shoals what did you do?

A. Anchored.

Q. How long did you remain there?

A. Until the next morning.

Q. The next morning what did you do?

A. Pulled up anchor and headed for Miami.

Q. Now on Sunday what did you do while you were anchored in that place where you were before you came to Featherbed Shoals? I have forgotten the name for the moment.

The Court:

Card Sound.

A. We went fishing.

Q. How many boats were used to go fishing?

A. Two fishing boats.

578 Q. I take it that you had charge of one?

A. Yes.

Q. Who had charge of the other?

A. The Chief Engineer.

Q. Who was in that boat in which you were fishing?

A. I had the whole party—Mr. McKay, Mrs. Just, Miss Grunow and Mr. Yeiser.

Q. Now during the entire time that you were fishing were all of those parties in your boat?

A. They changed after they got to the stream.

Q. Tell us how they changed.

A. Well, a little boat came along the side and it was very rough—

Q. Just tell us how they changed.

Q.[A.] Mr. Yeiser got over in the boat with the Chief and Miss Grunow.

Q. Who remained in your boat?

A. Mr. McKay and Mrs. Just.

Q. How long did you remain fishing with Mr. McKay and Mrs. Just?

A. About an hour.

Q. Now at the end of that time what did you do?

A. Well, we had to come back; Mrs. Just got awfully seasick.

Q. Did you observe her at the time you saw or say she became seasick?

A. Yes.

Q. What did you observe about her?

579 A. She was green in the face.

Q. Did you speak to her in regard to it?

A. Yes.

Q. What did she say to you?

A. I never spoke to her right then.

Q. Later on did you speak to her?

A. Yes.

Q. When was it that you did speak to her?

A. After we got back into smooth water.

Q. What did you say to her?

A. I told her that she had better take some purgative medicine that night.

Q. Did she say anything when you said that?

A. She said she would.

Q. Did you have purgative medicine on the ship?

A. Yes, sir.

Q. How long was it after that conversation that you returned to the big boat?

A. Probably an hour and a half.

Q. About what time was that?

A. That was just before—I would say around six o'clock.

Q. When you arrived at the boat what did the people do, that is, Mr. McKay and Mrs. Just?

A. That is when they all got out and went below.

Q. What did you do?

A. I tied my boats up and went forward.

580 Q. Now did you see either one of the four composing the party again that Sunday night?

A. I don't just understand that.

Q. Did you see either Mr. Yeiser or Mr. McKay or Mrs. Just or Miss Grunow any more that Sunday after they returned to the boat?

A. After I had dinner.

Q. And where did you see them then?

A. In the deck-house.

Q. Is that what is called the salon?

A. Yes, sir.

Q. What time did you see them then?

A. I would say around ten o'clock.

Q. And where were you?

A. I was in bed.

Q. And where is your bed with reference to the salon?

A. Just right next to the windows separating the salon from the pilot house.

Q. And from your bed is there any way in which you can look in the salon?

A. Yes, sir.

Q. What is it?

A. Two big windows.

Q. How close to your bed?

A. About as far as from here to there (pointing).

Q. You mean from that chair to the rail where the Judge is sitting?

581 A. Just about five feet.

Q. Do I understand you correctly that that distance you mentioned is the distance from your bed to the window?

A. No, the distance from the bed to where the card tables are at.

Q. What I want to know is where your bed is in relation to the window or windows?

A. Right against them.

Q. And this distance of five feet is where certain card tables are in the salon?

A. Yes. I thought you meant where I saw the party.

Q. First I want to know where the windows are or window?

A. Right beside my bed.



Q. What did you see Mr. Yeiser and Mr. McKay and Mrs. Just and Miss Grunow doing?

A. Playing cards.

Q. I take it at the card tables that you referred to before?

A. Yes, sir.

Q. What did you see on the table besides cards?

A. Well, I judge it to be—

Q. Don't judge it to be anything; tell us what you saw and let us judge what it was?

A. I seen glasses sitting on the table and I saw them drinking.

Q. You say you saw that about ten o'clock at night?

A. From about ten o'clock until about one, I guess.

Q. You were looking at them all the time?

582 A. Oh, no. I was trying to go to sleep.

Q. Did you finally get to sleep?

A. Not until they went to bed.

Q. Was there any reason that you couldn't sleep?

A. Sure.

Q. What was it?

A. The folks were having what I would call a nice party in there, see.

Q. How did that affect your sleep?

A. I don't guess any one could sleep when they were having a good party and being that close to it.

Q. You are envious?

A. No, sir.

Q. What was there about the party that kept you awake?

A. The noise.

Q. Will you tell us what noise you heard?

A. Well, the folks were having a big time in there, just like any people going out and playing cards and drinking, and when you are drinking and playing cards and talking naturally you talk loud.

Q. And that went on until around one o'clock, you say?

A. Yes.

Q. And the next morning you were informed in regard to the two women being found in their beds?

A. Yes, sir.

Q. Just tell us whether you were or not?

583

A. I said yes.

Q. Where was the vessel at the time and what were you doing?

A. She was in Biscayne Bay.

Q. At the time that you were informed in regard to the women in their beds, about how long in time, if you can give it to us, had the boat been running from the place where she started?

A. It couldn't have been over an hour and 20 minutes or 30 minutes, something like that.

Q. What did you do when you received word that these women could not be aroused?

A. I was sent for.

Q. Who came to you?

A. The colored boy-waiter.

Q. What did you do then?

A. He told me.

Q. What did you do then?

A. I went down below.

Q. When you went down below where did you go?

A. To the girls' room.

Q. Did you see the girls there?

A. Yes, sir.

Q. Where were they?

A. They were laying on the two beds.

Q. One on each bed you mean?

A. Yes, sir.

584 Q. Did you do anything with regard to the girls?

A. Yes.

Q. What did you do?

A. Picked them up and carried them on the deck, upper deck.

Q. While you were there did you see Mr. McKay?

A. Yes, sir.

Q. What did he say?

A. He told me that the girls had monoxide gas.

Q. Did you say anything to him?

A. I told him if the girls had monoxide gas that they would be knocked out when they were carried up in fresh air.

Q. That is your idea of the affects of carbon monoxide gas?

A. Yes, sir.

Q. You told him that at the time?

A. Yes, sir.

Q. Did you engage in carrying the girls up?

A. Yes, sir.

Q. Just one girl or both?

A. One at a time.

Q. Who else assisted?

A. The colored boy and I think Mr. McKay helped us some.

Q. Did you observe how the girls were dressed?

A. Yes.

Q. How were they dressed?

A. Dressed in night-clothes.

Q. Did you observe whether the night-clothes  
585 were dry?

A. Yes, sir.

Q. In what condition were they?

A. They were wet.

Q. Do you mean in the case of both girls?

A. Yes, sir.

Q. What brought that to your attention?

A. Picked the girls up myself; I carried the girls just like this and I could tell it.

Q. How could you tell him?

A. With my hand.

Q. I say how could you tell?

A. With my hands.

Q. You mean you felt it?

A. Yes, sir.

Q. Did you observe the beds from which you took the girls?

A. Yes, sir.

Q. In what condition were they?

A. Wet.

Q. You mean in both cases?

A. Yes, sir.

Q. Now while you were bringing Mrs. Grunow or Miss Grunow up the stairs did anything occur?

A. Bumped her head.

Q. You mean to say you bumped her head?

A. I did but I didn't mean to; I just bumped her head on the corner of the rail there; just touched it; 586 didn't bump it very hard.

Q. When she bumped her head did she say anything?

A. Yes, sir.

Q. Do you remember what it was she said?

A. I don't remember, no, sir.

Q. Was what she said in the form of words or was it a groan or something like that?

A. It was a mumble.

Q. It was a mumble?

A. Yes, she mumbled it.

Q. Now what did you do with the girls when you brought them upstairs?

A. I put Mrs. Just in Mr. Yeiser's room.

Q. Mrs. who?

A. Mrs. Just.

Q. In Mr. Yeiser's room?

A. No, it was Miss Grunow.

Q. Which was Miss Grunow; what kind of hair did she have?

A. She had yellow hair; I didn't take much notice of her hair, but I think it was kind of yellowish and reddish hair.

Q. You say you put Miss Grunow in Mr. Yeiser's room?

A. Yes.

Q. Whereabouts in the room did you put her?

A. On the bed.

Q. Where did you put Mrs. Just?

A. On the back deck. We had a big couch  
587 back there.

Q. Did you put some blankets on the women?

A. I didn't.

Q. But were some blankets put on them?

A. Yes, sir.

Q. After that where did the boat proceed?

A. To Miami.

Q. While you were proceeding up the bay to Miami did you have any talk with Mr. McKay?

A. Yes, sir.

Q. Did you receive any instructions from him?

A. Yes.

Q. What were they?

A. He told me to say nothing about that accident.

Q. To say nothing?

A. And to inform all of the crew.

Q. Inform all of the crew?

Mr. Mayne:

I didn't hear that.

A. He told me to say nothing about it and inform all of the crew.

Q. Inform all of the crew what?

A. To not say anything about this accident?



Q. Not to say anything to anybody else or not to talk it over among themselves?

A. Not to talk it over with anyone else.

588 Q. Now at the time that Mrs. Just was put upon the rear part of the boat what was the condition of the curtains surrounding?

A. They were all open.

Q. What did you do before you arrived in Miami with regard to these curtains?

A. Put the curtains down.

Q. And the effect of that was what, when you put the curtains down?

A. So no one could see them, I suppose.

Q. At whose direction did you do that?

A. Mr. Yeiser and Mr. McKay's; Mr. Yeiser usually gave the orders.

Q. How long after you arrived in Miami did you send for a doctor?

A. Just as quick as I could.

Q. How soon thereafter did the doctor come?

A. I don't believe he was over 30 minutes getting there.

Q. Now when he did come were you there while he was looking after the ladies?

A. Yes, sir.

Q. Did you observe Mrs. Just?

A. Yes, sir.

Q. Will you describe what you saw with regard to her?

A. Mrs. Just appeared to be pretty sick; she looked like a very sick person to me.

Q. Well did you see her doing anything?

A. No, sir.

Q. Did you hear her doing any talking?

589 A. No, sir.

Q. Were you there all of the time that the doctor was treating her?

A. Not all of the time, no, sir; I was on the boat; I wasn't back there.

Q. When you say "back there" do you mean back aft where Mrs. Just was?

A. Yes.

Q. Did you see Miss Grunow while she was in Mr. Yeiser's room?

A. Yes, sir.

Q. What did you observe with regard to her condition?

A. I observed her to be sick, but she wasn't very sick; just a few minutes after I put her on deck she was talking.

Q. Did you talk to her and did she talk to you?

A. I heard her talking to Mr. Yeiser and Mr. McKay as best I remember; I know it was Mr. Yeiser because he was in the room.

Q. You heard her talking with him?

A. Yes, sir.

Q. Was that about the time that the doctor arrived, or after or before?

A. It was before, I am sure.

Q. How long was it before Mrs. Just left the vessel?

A. Mrs. Just left as best I remember—I couldn't tell you just what time she left, but she left there about around eleven o'clock, although I wouldn't say for sure,  
590 because I was awfully busy.

Q. Well now up until the time that she left the vessel did you have any occasion to observe her?

A. I went back there with the doctor.

Q. At the time that she did leave the vessel did you see any change in her condition from what it had been when you brought her out?

A. Yes, sir.

Q. What change did you observe; just what change did you then observe?

A. I saw her turn up and look—

Q. What is that?

A. Look up.

Q. What?

A. She was laying down and she rolled over and looked at the doctor and I when we walked up.

Q. She didn't say anything, did she?

A. No, sir.

Q. Well now do you recall seeing Miss Grunow during the rest of the day on board the ship?

A. Yes, sir.

Q. About how many times during the rest of the day and up until the time that she finally left did you see her?

A. Not over three or four times.

Q. What time did she finally leave the vessel?

591 A. Somewheres around nine o'clock.

Q. Now at any of these times that you did see her before she left did you have any talk with her?

A. No, sir.

Q. What is that?

A. No, sir.

Q. Well, at the time that she was leaving did you speak to her or did she speak to you?

A. She spoke to me.

Q. She did?

A. Yes, sir.

Q. Will you tell us where that conversation took place?

Mr. Mayne:

Who was this, Miss Grunow or Mrs. Just?

Mr. Parmer:

Miss Grunow.

A. Outside of Mr. McKay's car.

Q. Had you been with her on the boat prior to coming to the car?

A. No, sir.

Q. I do not mean had you been with her in any sense except that you were along side of her. Did you see her on the boat before she left?

A. Yes, sir.

Q. Where did you see her?

A. In Mr. Yeiser's room.

Mr. Mayne:

This is all repetition. He has already testified to that.

592 Mr. Parmer:

I am trying to bring out what happened around nine o'clock. The other evidence was in connection with things that happened earlier in the day.

The Court:

You may proceed.

Q. I want to know did you see her around nine o'clock, just before she left on that day?

A. Yes.

Q. Were you in a room when you saw her?

A. There was windows all around the room, but you could see her in there and hear her talking.

Q. Could you hear her talking?

A. Yes, sir.

Q. Did you hear what she said at that time?

A. She said she wasn't going home.

Q. With whom was she talking?

A. With Mr. Yeiser I am sure.

Q. Was anybody else in the room that you remember?

A. Not that I remember.

Q. Well now when she finally did leave the boat who accompanied her to the gangplank?

A. I did.

Q. Did you have any talk with her as you were accompanying her to the gangplank?

A. No, sir.

Q. In what condition was she as she was leaving the vessel?

Mr. Mayne:

Conclusion of the witness.

593

Mr. Parmer:

I will withdraw the question.

Q. Did you observe anything with regard to Miss Grunow that was unusual as she left the vessel and you were with her?

A. Well, I told you that Miss Grunow acted like she was—

Mr. Mershon:

That is objected to.

The Court:

I do not see how he can do it otherwise. The objection is overruled.

A. She acted like a person two-thirds drunk.

Mr. Mershon:

I object to that as being a conclusion of the witness—two-thirds drunk.

Q. Well, we will see how he governs his percentage in that respect. When is a person two-thirds drunk in your opinion?

A. When they can't go.

Q. When they can't walk?

A. Yes.

Q. She could walk, so therefore you would say she wasn't that bad?



A. Yes, sir.

Q. What did you observe about her which gave you the information or opinion that she was as bad as you thought?

A. I saw her drinking.

Q. Whereabouts did you see her when she was drinking?

A. In Mr. Yeiser's room.

Q. What time was that?

A. That was all through the day after she roused up.

Q. Did you see her during the night doing any drinking?

A. There wasn't very much—

594 Mr. Mershon:

I object to that unless he knows what she was drinking. Let's see whether he actually knows that she was drinking intoxicating liquor. I do not think he has the right to draw this inference because he may have seen her drink something out of a glass.

The Court:

I think that is for the Court to determine as best it can from all of the evidence. I think the objection is not well taken and it is overruled.

A. That was awfully early; she went ashore at nine o'clock.

Q. You mean by that you didn't see it in the evening?

A. Not after it got dark; no, sir.

Q. What I want you to do is to be perfectly fair to Miss Grunow, and instead of saying "two-thirds drunk", being your own interpretation of it, tell us what you saw about her that made you think she was intoxicated?

A. Well, I smelled her breath; her breath was very strong with liquor.

Q. What did you observe about her manner of walking, if anything?

A. I had to help her along.

Q. You had to help her?

A. Yes, sir.

Q. You had to help her from where to where?

A. Out of Mr. Yeiser's room and down the gangway to Mr. McKay's car.

Q. Did you go with her to the car?

A. Yes, sir.

595 Q. Did she say anything to you then?

A. Yes.

Q. What did she say to you?

A. She told me—she says "Tell Henry good-bye and this is not the last of this". I told her right then that she should be ashamed of herself.

Mr. Mayne:

Tell who good-bye?

The Witness:

"Tell Henry good-bye".

(By Mr. Parmer):

Q. Was Mr. McKay with her then?

A. He was sitting in the car.

Q. Didn't he come on the boat?

A. I don't remember; maybe he did. The boy came and told me that Mr. McKay was there.

Q. Tell me, Captain, had you ever had any trouble with motor fumes on the Friendship II?

A. Yes, sir.

Q. Will you tell us the nature of the trouble?

A. It was awfully bad at times; when we had a stern wind most especially; it would blow the wind back into the back, and it would naturally blow them any other way.

Q. Now do you remember an occasion when Mr. Yeiser's two boys were affected by such fumes?

A. Yes, sir.

Q. Do you remember when that happened?

A. I don't remember the exact date.

Q. Do you remember the month?

A. Sometime in September.

596 Q. Of what year?

A. 1936.

Q. Well he was dead then. You see this thing happened March 2, 1936.

Mr. Mayne:

"I think it is testing the memory of this witness and Mr. Parmer.

Mr. Parmer:

Thank you. I wasn't certain as to the date.

The Court:

You may proceed with the examination.

(By Mr. Parmer):

Q. Now tell me was it at any time prior to going on this trip?

A. Yes, sir.

Q. That this accident to the two boys occurred?

A. Yes, sir.

Q. In September I think you said it was?

A. September.

Q. Well now will you tell us what you saw of that accident; did you see any part of it?

A. Yes, I saw one of the boys laying in the dining room and I picked him up and carried him and put him on the back deck.

Q. You don't know where he had been before?

A. He had been back in the after-stateroom studying his lessons.

Q. What happened to the other boy?

A. He got a little sick; it was awfully rough that day and I think he got gas off of the stern of the boat or somewhere around on the boat.

Q. As a result of that did you receive any  
597 orders from anybody?

A. I had right along.

Q. What orders had you received right along and what orders were given then?

A. To see that the after-windows were closed always by Mr. Yeiser.

Q. Were any orders given with respect to the exhaust pipes?

A. No, sir.

Q. You did not receive any orders from him, did you, at that time?

A. No, sir.

Q. Well, now did Mr. Yeiser ever say anything to you about what should be done with the exhaust pipe?

A. Yes, sir.

Q. What did he say?

A. That it should be run through the top into a stack.

Q. When these girls were brought back after this trip did Mr. Yeiser do anything or make any provision with regard to the exhaust pipes at that time?

A. That same morning.

Q. What did he say?

A. He told me to go out and get some men and get an estimate on that, and that he was going to put these exhaust pipes out through the stack.

Q. Had you been Captain for him on the Friendship I?

A. I sold it to him.

598 Q. You sold it to him?

A. Yes, sir.

Q. After you sold it to him were you captain on it for him?

A. Yes, sir.

Q. Had you had any trouble with the exhaust pipes from the outside there?

A. Yes.

Q. Where were the exhaust pipes on that boat?

A. On the side.

Q. What experience did you have with them on that boat?

A. She exhausted awfully bad.

Q. By that you mean what?

A. The gas would come back on top of the deck and lots of times you would have to get away from it.

Q. What did Mr. Yeiser do with regard to the exhaust pipes on that boat?

A. Put them up through the stack.

Q. When you were captain of the boat Friendship II prior to March 2, 1936 did you ever have any knowledge or notice that there were any holes in the exhaust pipes?

A. No, sir.

Q. You know that following a return to Miami a hole was found in one of them, do you not?

A. Yes.

Q. Did you have any knowledge that that existed prior to the vessel being on this trip?

599 A. No, sir.

Q. I think you said, Captain, that on Sunday morning early you went from Featherbed Shoals to Card Sound, is that right?

A. Yes, sir.

Q. Now at the time that you made that trip were any of the passengers up on the boat?

A. Not that morning; that was way after I anchored.

Q. That is, they got up after you anchored?

A. Yes, sir.

Q. How long again did that trip take you?

A. One hour and twenty minutes.

Q. How long after you anchored did the passengers get up?



A. I don't recall, but they had an awful late breakfast.

Q. Now did you receive any complaints during Sunday that anybody had been affected by any gas?

A. No, sir.

The Court:

When you left Miami was it on Friday or Saturday?

The Witness:

Friday afternoon.

The Court:

What happened all day Saturday?

The Witness:

We went fishing.

The Court:

You described Sunday. Now what happened on Saturday?

The Witness:

They went out fishing. Mr. McKay and Mrs. Just and the Chief went "bone fishing".

600 The Court:

Where was the boat then?

The Witness:

It was at Card Sound.

(By Mr. Parmer):

Q. Then you were at Card Sound on Saturday, was it or on Sunday?

A. Saturday and Sunday.

Q. You got there Saturday, was it?

A. Saturday morning.

Q. Saturday morning?

A. Yes, sir.

Q. And you remained at Card Sound during Saturday, during Saturday night and during the following Sunday and that Sunday evening, is that right?

A. Yes, sir.

Q. And then on Sunday evening you returned to Featherbed Shoals?

A. Yes, sir.

Q. Then it was on Saturday morning, was it, that you went from Featherbed Shoals to Card Sound?

A. Yes, sir.

Q. And that trip occupied one hour and 20 minutes?

A. Yes, sir.

Q. Now do you know in which stateroom Mr. McKay slept?

A. The port stateroom.

Q. How do you know that?

A. I seen his luggage, tooth brush and his belongings in there.

Q. In the port stateroom?

A. Yes, sir.

601 Mr. Mayne:

That is objected to as a conclusion of the witness, Your Honor. Just seeing a man's luggage in that room does not indicate that he slept there. He could have had his luggage in one room and slept in another room.

The Court:

We do not have a jury here. The witness says he slept in the port stateroom, and when asked how he knew that he said he saw his luggage in there. The question is certainly competent, so the motion to strike is denied.

(By Mr. Parmer):

Q. On the trip back from Featherbed Shoals to Miami what was done with these two boats that you used for fishing?

A. I tried to tow the two boats, but the cruiser had no towing rope on it; it was brand new, and I had to run one—let one of the other boys run one in, and he took the other boat in too.

Q. Who was that?

A. Chubby Mickle.

Q. What job did he have?

A. I used him as my mate on the boat; he didn't have no license or anything but I used him as my mate on the boat.

Q. Now, Captain, during this trip which began on the 28th and ended in Miami on March 2, 1936, did you observe Mr. Yeiser?

A. Yes, sir.

Q. Now what did you observe his condition to be so far as sobriety is concerned?

A. Noticed Mr. Yeiser was drinking, drinking awfully heavy again.

Q. What did you observe about him that indicated that to you?

A. His legs began to go bad on him again.

Q. Tell us how he walked?

A. His legs couldn't hold him up; he had to hold by his hands; he had to hold on to the rail of the boat because his legs were very weak.

Q. Did you see him on only one occasion during the three days of this trip or on more than one occasion?

A. For the whole seven as far as I know.

Q. I don't think you understood my question. I am talking about this three-day trip. I want to know if you saw him once or did you see him more than once during this three-day trip?

A. I noticed him Friday night, the afternoon before we left and then the whole trip; I noticed him getting worse the whole trip.

Q. You mean to say that he got worse as the trip progressed?

A. Yes, sir.

Q. Now on March 2nd when this boat returned from Featherbed Shoals will you tell us what his condition was on that morning?

A. Well, the man was a very sick man; he couldn't get around but very little; he was a very sick man and he told me that he was sick.

Q. What was his condition as far as sobriety was concerned that morning?

A. He began to drink again.

Q. When he was out fishing did you observe  
603 Mr. Yeiser have any accident?

A. Well, I noticed he got his leg caught between the two boats, when he went to pass from one boat to the other.

Q. You mean from one small boat to the other?

A. Yes, sir.

Q. How was the sea at the time he did that?

A. It was a very heavy sea.

Q. Did anybody else attempt to go from one boat to the other at that place?

A. No, not when he started.

Q. Did anybody assist him at the time?

A. I did my best to assist him.

Q. What do you mean by that?

A. I "knewed" that the man was going to get killed in there, it looked like to me and the water was awfully rough, and I asked him not to get in there and he said he was going to change over; I asked him not to get over in the boat, because it was something that he never did before and he fished with me every time.

Q. What was his condition at that time?

A. The man was just as drunk as could be; he had to have assistance to get around.

Q. Now on any of these fishing trips while you were using these boats did you see any of the people, that is, any of the four people I have mentioned, Mrs. Just, Miss

604 Grunow, Mr. McKay or Mr. Yeiser do any drinking?

A. Saturday morning before I went out Mr. Yeiser and Miss Grunow got in the boat and had the colored waiter hand them a bottle of wine.

Q. Where were they at that time?

A. They were in the cruiser.

Q. Was the cruiser alongside of the big boat?

A. Yes, sir.

Q. Did you see what they did with the bottle of wine?

A. They drank it.

Q. Did you see them?

A. They drank all but about two small drinks of it, and it was put in the ice-box and Mr. Yeiser drank that that evening.

Q. Did you see them drinking it?

A. Yes, sir.

Q. Now then, Captain, tell us about the log books you kept on that vessel. I show you Petitioner's Exhibit 2 and will ask you if you know what that book is?

A. Yes, sir.

Q. Tell us.

A. This is the log book I had the engineer keep especially for me.

Q. If you will look at it you will find that it goes from January 1st on.

A. Yes, sir.

Q. Until you severed your connection with the boat, is that right?

A. Yes, sir.



605

Q. Did you understand that question, Captain?

A. "I didn't keep this book at all.

Q. The engineer kept it for you?

A. This is my private book, private-log book.

Q. Was there another log book which preceded this one?

A. No, sir.

Q. Do you understand what "preceded" means?

A. You mean if there was another log book on the boat?

Q. No, I mean to say that before you started this book did you have another log book before it?

A. Yes, sir.

Q. Do you have any system with respect to having log books in accordance with years?

A. No, sir.

Q. But you did have a log book for this one?

A. Yes, sir.

Q. What became of that log book?

A. I have an idea I burned it up. I burned up all of my bills and everything excepting this book, because this book would have to be kept; all this was kept for was for the Underwriters; they had me to carry a log book.

Q. That was the latest book?

A. Yes, sir.

Q. When did you finally sever your connection with the Friendship II; when did you finally leave the employ of anybody on that boat?

606

A. Sometime in October.

Q. Of what year?

A. 1933.

Q. At the time when you left did you have an accumulation of papers on board the ship? Do you know what I mean?

A. No, sir.

Q. I think I am using big words here.

A. What I had I took off.

Q. What did you do with them after you took them off?

A. I burned all of my bills and everything.

Q. What bills?

A. I paid all bills on the boat; I had to look out for all bills.

Q. You mean to say that you disbursed money for Mr. Yeiser?

A. Yes, sir.

Q. Then if Mr. Yeiser wanted to get money he had to come to you?

A. Yes, sir; he did in the last year; when he was put under the Probate Court he had to come to me for money.

Q. You had a fund of money here?

A. Yes, always.

Q. So you could give it out to him?

A. Yes, sir.

Q. You paid such bills with the money in your possession and those bills were burned up?

A. Yes, sir.

Q. You also think you burned up the log book preceding this one?

607 A. I destroyed that log book about the same time I got this one; it was destroyed over here in Flamingo Dock. I remember that the Chief came over there and brought this one, so I didn't have the other one since then; I never carried one myself; the engineer took care of it.

Q. Now, Captain, did you make measurements of the room, that is, the stateroom, the after-stateroom in question, in connection with this test that was performed in the summer of 1936?

A. What?

Q. Did you make measurements of that after-stateroom?

A. Yes, the Chief and I did.

Q. In other words, you had a tape measure?

A. Yes, sir.

Q. And you and the Chief handled it and made the measurements?

A. Yes, sir.

Q. Now I show you a blueprint, Chief, and I will ask you if you can tell us what that is?

A. This is a blueprint of the Friendship.

Q. You mean the Friendship II?

A. Yes, sir.

Q. Will you look at it and tell us if it represents substantially the layout of the different rooms on the cabin deck and on the main deck?

A. Yes, sir.

Q. I am not asking you whether it is drawn to scale. You did not prepare this yourself, did you?

A. I had it done.

Q. You didn't make all of the measurements  
608 on the basis of which this blueprint was drawn up, did you?

A. No, sir.

Q. But it does represent substantially the layout of the different rooms?

A. Yes, sir.

Mr. Parmer:

For that purpose I wish to offer it in evidence.

The Court:

I think you would have made better progress if you had done that two or three days ago?

Mr. Mershon:

We asked for a plan about two or three days ago and they said they didn't have it.

Mr. Parmer:

I did not have it here; I had to get it from New York.

Mr. Mershon:

I would like to ask the witness with reference to the original drawing from which this blueprint was made.

By Mr. Mershon:

Q. Where is the original drawing from which this blueprint was made?

A. Fort Meyers.

Q. Is it in your papers, in your possession?

A. No, I never kept it.

Q. Who has it now?

A. A man over there that makes them; I will have to get you his name.

Q. This blueprint bears your name. Did you  
609 do the actual drawing on it?

A. No, sir.

Q. Who made that drawing?

A. A fellow by the name of Fred Diehl at Fort Meyers.

Q. Did he go on the boat and take some measurements?

A. Yes, sir.

Q. Did he prepare to make that drawing from looking at the boat and measuring the boat?

A. Yes, sir.

Q. In other words, did he survey the boat in order to make that blueprint, or sketch rather?

A. Yes, sir; he is a regular architect. Doesn't that give the date when it was made?

Q. Yes. How long after Mr. Yeiser had acquired the boat was it that you had this sketch made?

A. I don't remember just when it was, but I know he wanted to charter the boat and he wrote me and asked me to have this made for him.

Q. You don't say, do you, that this sketch purports to show in detail the layout of the boat, but it is just a general outline?

A. It is a sketch; it is given to you on a scale there.

Q. For instance, on the after lower deck, known as the main deck, as a matter of fact there is a lazaret, that

is, a vent of some kind but that is not shown on this sketch, is it?

A. Yes.

610

Q. Is there a main-hall there?

A. He didn't draw that in.

Q. There are a lot of details like that not shown on there?

A. He didn't take the furniture and put it on there, no.

Q. There are many details like that not shown on here?

A. Yes.

Q. Then this does not purport to be a detail plan or specifications of the Friendship II, does it?

A. It is a detail sketch made of the boat to give you an idea of those who were going to charter the boat.

Mr. Mershon:

If Your Honor please, we object to its introduction in view of the testimony of the witness. We have no objection to its introduction as a general outline of the layout.

Mr. Parmer:

That is what I offered it for.

Mr. Mershon:

We have no objection to its being admitted as a general outline of the layout of the boat, but we object to it as showing the relative location of the staterooms and the engine-room. We do not admit the accuracy of the sketch, nor do we admit that it purports to show the details of the boat and its equipment; for instance, we say that it does not purport to show the location of the exhaust pipes or the cross-members—

611

The Court:

It does not show the structural condition down below the floor-boards?



Mr. Mershon:

No, sir.

The Court:

It certainly is incomplete, but if you gentlemen want it to go in to show the general outline, there seems to be no objection to that. It certainly is incomplete and it is not testified to by the man who made the measurements. If you want it to show the general outline of the layout, it can go in for that purpose.

Mr. Parmer:

And to show where the rooms were in relation to each other.

(Thereupon the sketch above referred to was marked PETITIONER'S EXHIBIT No. 3.)

(By Mr. Parmer):

Q. Now, Captain, does this show where your bunk was in relation to the salon?

A. It gives you a sketch of it.

Q. That area there marked "Captain's bunk"; that is, where you were laying when you looked into the main salon, is that right?

A. That is right.

Q. And this area marked "Cabin" here on the plan of the cabin-deck on the aft part of that plan, is that the cabin where the ladies slept?

A. Yes, sir.

Q. Which cabin was it that Mr. McKay used?

A. Down here (indicating).

612 The Court:

Put a mark on that. Let him put a mark on there to identify it.

Q. Mark it with the letter "A".

A. (Witness complies).

Q. Now is that "A" the cabin which was occupied by Mr. McKay?

A. Yes, sir.

Q. Now did you make measurements yourself of this aft cabin?

A. Yes, sir.

Q. When did you make your measurements—you and the engineer?

A. That was after this trip, after this happened.

Q. Do you know the month in which you made the measurements?

A. No, sir, I didn't keep any track of it.

Q. Now do you know what the measurements of the room were according to what you ascertained at that time?

A. That is a pretty hard thing to remember. I will say 15-feet in beam.

Q. Tell me if as a result of making these measurements you sent a telegram to Mr. Coleman?

A. Yes, sir.

Q. Advising him with regard to the measurements?

A. Yes, sir.

Q. Will you look at this telegram and use it to refresh your recollection and tell us what you found the measurements to be when you measured the aft state-room on the Friendship II:

A. You want me to tell you what it was?

Q. I want you to tell me what those measurements were, if that telegram serves to bring it back to your mind?

A. Yes, it does.

Q. What is that?

A. It brings it back.

Q. How wide was the room, that is, going from one side of the vessel to the other side of the vessel?

A. 15 feet.

Q. What was the dimension of the room in the fore and aft direction?

A. Nine feet and four inches.

Q. What was the dimension of the room from the floor to the ceiling?

A. Six feet four inches.

Q. Captain, in taking that measurement of that room, did you note how the sides of the boat came in as you go further aft?

A. Yes, sir.

Q. Whereabouts on the side wall did you run your tape in order to measure the athwartship dimension of the room?

A. I taken the widest place right next to these two clothes-lockers; that was the widest place there.

Q. Would you say that was the place where the clothes-lockers are that you referred to?

A. Yes, sir.

Q. All right, will you mark an "X" on one of them and an "X" on the other one?

A. (Witness complies).

614 Q. Do you mean that it was between the two X's that you measured the room?

A. Yes.

Mr. Mershon:

Where are those X's?

Mr. Parmer:

They are on here.

Mr. Mershon:

We would like to see them and show them to the Court.

Q. Captain, you say you had four bottles of gin when you started on this trip?

A. Yes, sir.

Q. Tell me what you did with the four bottles of gin?

A. I gave them out to the colored waiter.

Q. Did you give them out all at once to him?

A. No, sir; when he would get out he would come and tell me about it and I would give him another one.

Q. Did you have any of these four bottles of gin in your possession at the time that you returned to Miami?

A. No, sir.

Mr. Parmer:

That is all for now.

Cross Examination.

By Mr. Mershon:

Q. Captain Roberts, how long had you known Henry C. Yeiser?

A. Ten years.

Q. Was the occasion of your first meeting him when you went to work for him?

615 A. I used to charter to him.

Q. You mean you chartered your boat to him?

A. Yes.

Q. And you later sold your boat to him and became his captain?

A. Yes, sir.

Q. As a matter of fact, in addition to being his captain you were rather close personal friends?

A. The best friend I ever had.

Q. As a matter of fact when he died in his will he canceled a loan which he had made to you of some several thousand dollars, secured by a mortgage on your home?

A. Yes, sir.

Q. When you first met him was he given to drinking as much as he was in later years?

A. Yes, sir.

Q. He had always been a heavy drinker?

A. Yes, sir.

Q. Had you throughout the ten years had about the same trouble fighting with him to keep him from drinking?

A. Only after I went to work for him.

Q. You did not assume that responsibility until after you actually went to work for him?

A. No, sir.

Q. About how many years was that?

A. I chartered to him two years before he bought the boat.

Q. So that would be approximately four years  
616 before March 1, 1936; it would be approximately four years?

A. He bought the boat in 1930.

Q. From you?

A. Yes, sir.

Q. So it would have been practically six years, five or six years?

A. It was over six years, I would say.

Q. During that time did he keep up his extra-heavy consumption of liquor or would he take a treatment and sober up?

A. Take a treatment and sober up.

Q. And then he would go back again?

A. Yes.

Q. Would he do that without any apparent reason?

A. Well, his only reason I guess was to try to get sober.

Q. What would be his reason on each of the occasions to go back to his drinking in full force again?

A. The doctors or no one else could do anything—the way I judged was that his drinking was a disease.

Q. So what people said to him or did to him didn't have anything to do with out; it was this uncontrollable desire, was it?



A. That is what I would say.

Q. At the height of his sprees or drinking activities did you have occasion to know how much liquor he would drink in a day or in 24 hours?

A. Yes, sir.

Q. How much would that be, if you know?

617 A. When he was drinking the way you figure it there it would run around four quarts in 24 hours.

Q. How many days at a time could he keep that up?

A. I would say he kept it up for 30 days at a time.

Q. Then what would happen?

A. He would just get so low that he couldn't drink anymore; if I had him I would try to get him somewhere or get a doctor to him and I would cut his liquor down. The doctor always told me not to take it all away from him, but to take it in hand and do just as best I could. He was very mean about his drinking, but when he got sober he was very civil and it seemed like he would try to make an effort to quit but he never could.

Q. Then could you take him in hand and curtail his drinking or taper him down?

A. I would take him away on quite a few trips.

Q. How long would it take you to bring his consumption of four quarts in 24 hours down to the minimum amount?

A. It wouldn't take over three or four days.

Q. What would be the minimum amount he would take in 24 hours when you brought him down from four quarts?

A. Probably a quart of gin, or six or eight bottles of beer, or maybe a dozen bottles of beer a day.

Q. That was the lowest you ever knew him to take?

A. No, I have had him perfectly sober.

Q. Where he didn't take a bit of liquor?

618 A. I would have to take him down in the Shark River country.

Q. What would be his nervous condition?

A. Looked like he couldn't stand it, but if I seen that he had to have it, if it looked like he was going to lose his mind, I would always give him a drink.

Q. You undertook to rather measure it out to him under those circumstances?

A. Yes, sir.

Q. When you say you threw the liquor overboard you mean you still had some in reserve to give him?

A. Yes, sir; just to keep from lying to him; I just did everything I could.

Q. When you said you threw the liquor overboard and then he would want to go to Key West or Miami, you mean that he wanted to go there for new supplies of liquor?

A. No, he always had something.

Q. In other words, he didn't have to go to Miami or to Key West to get liquor?

A. He didn't have to come to Miami for liquor.

Q. But when he got here he would order liquor?

A. That was the first thing that was ordered when I tied up at the dock.

Q. Then when you had him perfectly sober after one of these trips he would start again his large consumption and work up to his outside limit?

A. You couldn't tell anything about him; he was awfully bad. We would get him sobered up and then in four hours he would get to drinking again.

Q. And in a day or two, after being fairly sober for a few days, he would start right back and consume or maintain his four-quart schedule?

A. Not the first day; it would take him a few days to get up to that; the more he drank the more he wanted.

Q. Did you ever drink with him, Captain?

A. I never drank with him. The first time I ever drank with him and the only time was when I was

chartering to him, and that the time I got notice, when his father told me that he came down there with him so he could get away from drinking up there, and I told him that would be my last drink with him.

Q. When you say he could go 30 days at a time drinking four quarts a day, do you realize that that is 30 gallons of liquor?

A. Yes, I do.

Q. And in addition to that would there be any beer?

A. No, sir, and very little to eat, too.

Q. There would be beer?

A. Very little to eat and no beer.

Q. Did he mix his liquor with wine and so forth?

A. No, sir.

Q. He wouldn't drink beer when he was drinking hard liquor?

A. No.

Q. You couldn't get him to mix the two?

620 A. No, sir.

Q. Would he mix gin and other liquors?

A. I never saw him.

Q. What kind of liquor did he drink mostly?

A. He usually drank gin; gin was his favorite drink when he could get it.

Q. And if he had gin he wouldn't drink anything else?

A. No, sir.

Q. Captain, do you remember over in Fort Meyers in October, 1936 when I, M. L. Mershon, and Mr. W. O. Merhtens, who sits here by me, and another gentleman whose name is Mr. Worth Monroe, were aboard the yacht, Friendship II, on the day that they had advertiesed her and were to sell her?

A. I remember you.

Q. Do you remember me asking to see the log of the Friendship II?

A. Yes, sir.

Q. What did you say and do?

A. Well, the Trustee I believe came to me—you didn't ask me—you asked Johnson Woolsler, who was the guardian or trustee of the boat at the time—but Johnson came and asked me could you have it. I don't know how you do get it, but you had that log book in the pilot house, as best I remember, and I told Johnson that that was my own personal property and that you or no one else should see that log book.

Q. And thereupon it was returned to you?

621 A. It was returned to me.

Q. Was that log book in the pilot house there that day, this book here?

A. That is the book you have in your hands.

Q. Did you make the statement at that time that that was not a part of the boat, that it didn't go with the boat, and that it was your own personal private record and that no one else could see it?

A. Only the Underwriters and the U. S. Marshal.

Q. You mean the insurance underwriters?

A. Yes, sir.

Q. Do you also remember on that same day, on the same occasion but a little earlier, that you came aboard the yacht Friendship II and found me and the other two gentlemen in the lower part of the boat, in the aft part, in the act of raising the hatches and looking at the exhaust pipes under the dining salon?

A. You didn't tell me what you were going to look at; you went in there and looked to me like you were "ram-shacking" the boat and I was the Captain of it.

Q. Was the engineer, Mr. Blount, also there?

A. He was down there when I came on the boat.

Q. Were you in uniform when we were making an inspection of the boat?

A. I was.

622 Q. Were you not informed that we were undertaking to make an examination of the exhaust pipes?

A. I was.

Q. Were you not informed that we were doing that with the permission of Mr. Johnson Woosler, the trustee in admiralty?

A. No, sir.

Q. Didn't you discuss the matter with Mr. Woosler?

A. Not at that time.

Q. Didn't you make a statement to Mr. Mershon, in the presence of Mr. Merhtens and in the presence of Mr. Worth Monroe, that we couldn't make such an examination without your receiving orders from Mr. Woosler to do it?

A. Yes, sir.

Q. Had you been shown a letter which Mr. Merhtens then had from Mr. Woosler authorizing him to come aboard and inspect the vessel?

A. Probably.

Q. You didn't pay any attention to such a letter if it was shown to you?

A. I would have had to at that time.

Q. What did you do then; did you go and call Mr. Woosler yourself over the telephone?

A. I went up there with this boy.

Q. With Mr. Merhtens?

A. Yes, sir.

Q. And Mr. Merhtens called Mr. Woosler in your presence?

A. Yes, sir.

623 Q. Did you talk to Mr. Woosler?

A. Yes.

Q. What did he tell you?

A. I don't remember just what he did say then.

Q. Didn't he say just hold everything and he would come down there in a few minutes?

A. Probably he did; I don't remember what he did say, but I know he came down there.



Q. But you stopped any examination under the hatches, didn't you?

A. Yes, sir.

Q. And before that examination could be completed or undertaken thereafter Mr. Woosler came aboard and held the sale to sell the boat, didn't he?

A. I believe he did.

Q. And thereupon the representative of the new purchaser and Mr. Woosler and yourself announced that the boat had changed hands and that we could not make any such examination?

A. I never said that; Mr. Woosler might have.

Q. Do you recall who the representative of the purchaser was; wasn't it Mr. John Stokes, Junior?

A. I believe it was.

Q. You said that Mr. Stokes was also the representative of the Yeiser estate at the time, didn't you?

A. No, I didn't understand that he was.

Q. Did you know that his firm, Loftin, Stokes  
624 & Caulkins then represented the Yeiser estate?

A. No, sir.

Q. Had Mr. Coleman, or any member of that firm come over and notified you prior to that time that they were representing the Yeiser estate?

A. I talked to this gentleman here, Mr. Coleman.

Q. Did you know that he was a member of the firm of Loftin, Stokes & Caulkins?

A. Yes, sir.

Q. Attorneys at Miami?

A. Yes, sir.

Q. You knew that he represented the Yeiser estate?

A. Yes, sir.

Q. You also knew, did you not, that Mr. John Stokes, Junior, was a member of that firm and associated with him.

A. I didn't know that boy that day.

Q. I will show you a letter marked for identification "Claimants' Exhibit No. 12", and ask you if Mr. Mehrtens didn't show you that letter over on the yacht, Friendship II, that day?

A. I remember this letter, yes.

Q. You would not recognize that letter though until you talked to Mr. Woosler on the phone, would you?

A. No, sir.

Q. You never recognized this letter until Mr. Woosler had come aboard and began to make the sale of the boat?

A. I would not have recognized it then.

625 Q. As Captain of that boat you asserted your authority over it and prevented Mr. Merhtens, Mr. Mershon and Mr. Worth Monroe from inspecting the exhaust pipes in the bilge of that boat at that time, didn't you?

A. Not only you but three more parties that same day.

Q. Did any other parties tell you that day that they were looking for holes in the exhaust pipe and wanted to inspect that pipe for that purpose?

A. They wanted to come aboard there and inspect her, go through her.

Q. You were informed by Mr. Merhten's party that they were looking for leaks or the condition of the exhaust pipes?

A. I believe so, yes.

Q. And you said that they couldn't make such an examination?

A. When I went below I didn't know either one of you fellows and I had never seen you before, and I never had this letter then.

Q. But after the thing was explained to you, Captain, you still refused to permit that inspection to be made, didn't you?

A. Yes, sir.

Q. And you refused to permit that pipe to be seen, didn't you?

A. Yes, sir.

Q. Now in what capacity were you in command of that boat; that is, under whose orders and directions were you at that time before the boat was sold?

A. Mr. Johnson Woolsler.

626 Q. As trustee appointed by this Court?

A. Yes, sir.

Q. Now I will ask you if this letter which Mr. Mehrtens presented to you was not written on the stationery of Mr. Johnson Woolsler?

A. I don't know about his stationery, because I never seen any of it.

Q. Do you know his signature?

A. I would know it if I saw it.

Q. What did he tell you when you called him on the phone that day about that letter?

A. He told me that he would come down.

Q. Did he say he had written a letter to you?

A. I never asked him nothing; I believe this boy (Mr. Mehrtens) called him up first; I don't remember it at all, but he told me that he would come down to the boat.

Q. You took full responsibility, however, for preventing that inspection, didn't you?

A. Just as any other captain would do on a boat.

Q. Did Mr. Woolsler ever instruct you not to permit that inspection?

A. I had instructions from Mr. Woolsler to let no one on the boat.

Q. That was your general orders?

A. Yes, sir.

Q. And you declined and refused to obey this order from your employer, John K. Woolsler, which  
627 letter said: "this will introduce to you Mr. W. O. Mehrtens, of the law firm of Evans, Mershon & Sawyer, Miami, Florida. This is the party about whom I spoke to you yesterday. Please allow him and his party admittance to the boat for inspection and also to take any

pictures of the boat." You refused to honor that letter when it was presented to you, didn't you?

A. Yes; have I got a right to tell you why I did?

Q. Yes. I am sure that your counsel will ask you that.

The Court:

What do you mean by his counsel?

Mr. Mershon:

That was a slip of the tongue, Your Honor.

Q. Now, Captain, you saw the Friendship II down in Miami for about 19 days before it started out on this trip on February 28th, 1938. As a matter of fact it had been in Miami a number of times since September, 1935, had it not?

A. Yes, sir.

Q. With Mr. Yeiser aboard?

A. Yes, sir.

Q. And he had been doing his periodical drinking, periodical heavy drinking during those visits?

A. Yes, sir.

Q. Do you know who called Dr. Spencer Howell to treat Mr. Yeiser?

A. Chief Blount.

Q. Do you know at whose direction he called  
628 him?

A. At whose orders?

Q. Yes, at whose orders did Chief Blount call Dr. Howell?

A. My orders.

Q. Had you known Dr. Howell prior to that time?

A. Yes, sir.

Q. How long had you known Doctor Howell prior to the time you told Chief Blount to call him?

A. Well, probably six weeks or a month.

Q. Had you had an acquaintance with him of some kind, casual or otherwise?

A. No, sir, only he was on the boat as doctor for Mr. Yeiser.

Q. On previous occasions he had been on the boat?

A. Yes, sir.

Q. On how many previous occasions had he been aboard the Friendship II doctoring Mr. Yeiser?

A. About 14 days before this trip he came aboard; he came two or three times a day.

Q. I am sorry, but you have misunderstood my question. When he first came aboard 14 or 15 days before this trip—

A. I had a doctor by the name of Hudson and he recommended me to get this doctor, and as best I remember he sent him down to the boat.

Q. You didn't call him directly?

A. No, sir.

Q. How many times did Mr. Yeiser come ashore in Miami during the 10 to 15 days the Friendship  
629 II was tied up at the Royal Palm Dock just before this trip of February 28th?

A. She wasn't tied up at the Royal Palm Dock; she was out—

Q. She never was tied up at the Royal Palm Dock at all on any of those occasions?

A. Only once or twice when we came in to get water.

Q. All right, with that correction can you answer the main part of my question.

A. About one time and that happened before this trip; that was Thursday before this trip.

Q. You mean only Thursday and no other time?

A. Yes, sir.

Q. And you say he was walking along unassisted, that he went ashore and came back?

A. He was walking just as straight at that time as anyone here can walk.



Q. How long had he been walking that way before he went ashore?

A. He was walking around there a couple or three days.

Q. On the boat?

A. Yes, he would get up in the morning and take his exercises and then he would probably go to bed and sleep the rest of the day.

Q. What kind of exercises?

A. Just walking around the rail; he laid on the boat so much that he had to get his legs straightened a little.

Q. What was the nature and the size of these two fishing boats you took along?

630 A. One of them was 36-feet long and the other one was about 26 or 28.

Q. The 26-foot boat was an open boat?

A. Yes, sir.

Q. And the 36-foot boat was a cabin cruiser?

A. Yes, sir.

Q. Were those boats towed when you went from Miami or did they run under their own power?

A. I started to tow them but we couldn't tow them.

Q. So they went under their own power all of the way?

A. I might have towed the little one.

Q. Chubby Mickle run at least one or the other of the boats all the way down to Card Sound?

A. The cruiser, yes.

Q. When you came back did you tow either of these fishing boats when you left Card Sound to come to Miami?

A. I tried to tow them, but I know that we run the big one.

Q. You are sure that Chubby Mickle ran the cruiser all the way from Card Sound to Featherbed Shoals and then on the second lap from Featherbed Shoals into Miami?

A. I am not sure about from Card Sound to Featherbed Shoals.

Q. What did you say?

A. I won't be sure.

Q. What about the other one?

A. He run the big cruiser.

Q. What?

631 A. He run the big cruiser from Card Sound.

Q. Was there any reason why he couldn't run the large one?

A. It was dark and the best I can remember is that he might have untied it and run it on to Featherbed, but the other boat had no towing line.

Q. When you docked at Card Sound how far was that from Angel Fish Creek?

A. About a mile and a half from where I was anchored; Card Sound runs along Angel Fish Creek.

Q. Is Card Sound on the outside of the reef or inside?

A. It is inside of the bay.

Q. How far from where you anchored was it to the mouth of Angel Fish Creek?

A. About a mile and a half.

Q. How far from Bower's Key?

A. About the same thing.

Q. In other words, there is a circle in there where you fish around the house-boat Friendship II?

A. No, we fished outside.

Q. You went outside and fished?

A. Where you anchored could generally be referred to as the mouth of Angel Fish Creek in the neighborhood of Pumpkin Key?

A. They call it Angel Fish Creek when you get down in that section.

632 Q. When you left at 5:30 P. M. on Friday afternoon, February 20, 1936, where did you leave from?

A. What?

Q. What port did you leave from when you went from Miami down there?

A. Royal Palm Dock.

Q. How long had you been tied up at the Royal Palm Dock?

A. We got there Thursday afternoon.

Q. You came in the dock Thursday afternoon?

A. Yes, sir.

Q. And that is where Mr. Yeiser went ashore?

A. Yes, sir.

Q. And you stayed there until Friday afternoon about 5:30?

A. Yes, sir.

Q. How far from Royal Palm Dock to where you anchored the first night near Featherbed Shoals?

A. About 18 miles.

Q. How far is it from that anchorage at Featherbed Shoals down to the neighborhood of Angel Fish Creek where you anchored?

A. I don't keep that in my mind; I can get it off of the chart; it would be 32 miles from here, the whole distance, but I never—

Q. Angel Fish Creek is just opposite the Key Largo Club?

A. Yes, sir.

Q. There was a great many fishing boats plying around there at that time?

A. Yes, sir.

633 Q. In other words, there was no particular anchorage?

A. No, sir; generally all of the captains have their own anchorage picked out there.

Q. On what day was it, Captain, that you fished with Mr. McKay and Mrs. Just was so sick; was that on Saturday or Sunday?

A. Sunday afternoon.

Q. Had you fished with Mrs. Just and Mr. McKay on Saturday?

A. No, sir.

Q. Who did they fish with on Saturday?

A. Chief Blount.

Q. Is that when you say they went bone fishing on Saturday?

A. Yes, sir.

Q. That Sunday what time did you take Mrs. Just and Mr. McKay out?

A. That was after lunch.

Q. Just in the afternoon?

A. Yes, sir.

Q. You don't remember the particular time?

A. No, I don't.

Q. And you say they fished for about an hour and a half?

A. That is about right.

Q. You observed that she looked seasick?

A. Yes, sir; she told me that she was seasick.

Q. She got that way while she was out fishing in that boat with you and Mr. McKay?

634 A. Yes.

Q. Did she vomit?

A. No, sir.

Q. How long were you away from the big boat, Friendship II, on that occasion when she and Mr. McKay were with you and she got seasick?

A. It would take me 20 to 25 minutes to run in from the reef, and it was still rough, and I came up to the mouth of Angel Fish to grunt-fish—

Q. Was she feeling better?

A. She was still laying down. We wanted to see if we could catch some grunts. Mr. McKay was catching them pretty good and she did get up after a while and fish a little bit. I don't remember how long it was that we were anchored out there.

Q. What was the color of her face?

A. The first time I noticed anything her lips had all turned purple and her face was kind of whitish.

Q. Her lips were purplish and her face kind of whitish?

A. Yes.

Q. By the time you got back to the big boat was she feeling better?

A. She was recovered a little bit but she didn't feel good.

Q. You got back before dinner-time?

A. Yes.

Q. She ate dinner with the rest of them?

635 A. Yes—I don't know. I didn't see her any more until that night.

Q. When did you next see her after you put her on the boat?

A. That was around ten o'clock that night.

Q. That was when she was in the deck salon playing cards?

A. Yes, sir.

Q. And did she look all right then?

A. She looked like she was feeling pretty good.

Q. Captain, you said that Mr. McKay slept in the port state-room. Did you see him sleeping in there?

A. Not on this special trip, no, sir.

Q. Did you see him in that port stateroom at all?

A. No, sir.

Q. All you saw was his baggage, is that right?

A. Yes, sir.

Q. What was the occasion for you seeing that?

A. Because there were only three beds made up—

Q. I asked you what was the occasion for you being down there.

A. I went down there to get these two ladies.

Q. That was the only time you were down there?

A. Yes, sir.

Q. And that was when you saw Mr. McKay's baggage in the port stateroom?

A. Yes.

Q. Was the window up in that port stateroom?



A. I never noticed.

636 Q. Was the door open in the port stateroom?

A. Yes.

Q. Was the door open into the starboard stateroom?

A. I don't think it was; I am sure it wasn't; that room was not being used that trip at all; it was closed and the bed was made up.

Q. I asked you, Captain, if when you looked into the port stateroom and saw the door open, if you looked to see whether the door was open to the starboard stateroom; did you look?

A. I am not sure.

Q. Do you remember whether the starboard stateroom door was open or shut?

A. I don't know.

Q. You do not remember that at all?

A. No.

Q. How many windows are there in the port stateroom?

A. One window in the port stateroom.

Q. How many windows in the starboard stateroom?

A. One.

Q. Is your memory as good about that as it is about seeing Mr. McKay's baggage in the port stateroom?

A. Yes.

Q. I will ask you to look at this sketch that you have identified and tell us how many windows it shows in the port and starboard staterooms?

A. Two.

637 Q. So your memory is not very good about either one of them?

A. No, sir.

Q. So, Captain, if you cannot remember how many windows were in the staterooms of a boat on which you were captain for a number of years, with occasion to examine her, and you admit that you do not remember that, is your memory of what you saw on the side there

while you were getting these ladies out of an emergency position, any better?

A. Yes, sir.

Q. How long were you in the double-cabin?

A. No longer than I could get the ladies out of there.

Q. Who picked them up out of their bunks?

A. I did.

Q. How or what part of them did you hold; did you hold the head, feet or the middle?

A. I picked the ladies up as best I could and carried them.

Q. At the small of their backs?

A. Yes.

Q. In a sitting-up position?

A. I picked them up that way, and Mr. McKay taken hold of their feet and the colored boy taken hold by the hands—

Q. Stand up and show us about the position you held them in bringing them out of that cabin?

A. How am I going to show you if you don't give me someone to—

638. Mr. Mershon:

How much do you weigh, Mr. Mehrtens?

Mr. Mehrtens:

About 138 pounds.

Mr. Mershon:

Now show us.

(Thereupon the witness demonstrated with Mr. Mehrtens the manner in which he claims to have picked up the claimants.)

(By Mr. Mershon):

Q. That was the way you carried them?

A. Yes.

Q. You were walking forward from the stateroom?

A. I had to walk sideways, this way (indicating).

Mr. Mershon:

Let the record show that the witness holds subject in prone position, suspended across the witness' chest, with subject's face looking downward.

Q. Had you seen Mr. McKay earlier in the morning before you went down into this aft cabin?

A. I don't remember.

Q. Had you seen Mr. Yeiser before that?

A. No, but I heard Mr. Yeiser.

Q. Where was he?

A. He was down below somewhere; I don't know where he was.

Q. You had not seen him?

A. No.

Q. Was Mr. McKay dressed when you saw him in the cabin?

A. Yes, sir.

Q. Did he have his clothes on? I mean his regular clothes.

A. I am sure he did.

Q. When you went down into this aft cabin where the ladies were who did you find there?

A. Mrs. Just and Miss Grunow.

Q. Was Mr. McKay there?

A. Yes.

Q. Was Mr. Yeiser there?

A. Yes.

Q. What was Mr. Yeiser doing?

A. He was sitting down.

Q. Where was he sitting?

A. On one of the beds, as best I can remember; I don't remember what bed it was.

Q. He was sitting on one of the beds?

A. Yes, on the side of it.

Q. Were there any chairs in there?

A. One little chair.

Q. You are sure he was sitting on the bed?

A. Yes, sir.

Q. Do you know which bed?

A. No.

Q. What did Mr. Yeiser say to you?

A. Mr. Yeiser told me those girls were under monoxide gas.

Q. What did he tell you to do with them?

A. He told me to take them up on the deck.

Q. Did he tell you to put Miss Grunow in his stateroom?

A. Yes, sir.

Q. It was under his orders that you did that?

640

A. Yes, sir.

Q. Which one did you take out first?

A. I believe I taken Miss Grunow out first.

Q. She was the one whose head hit something and she mumbled?

A. Yes, sir.

Q. Did Mr. Yeiser follow you up on to the upper deck after you took the young ladies out?

A. Yes, sir.

Q. Did he wait in the stateroom until you had moved them out?

A. Yes, sir.

Q. Were the windows in the stateroom at that time open or closed?

A. They were closed.

Q. They were closed?

A. Yes, sir.

Q. Was the door open or closed when you walked in there?

A. As best I remember it was closed.

Q. The door to the stateroom?

A. When I came from up on upper deck and went in there.

Q. And you found Mr. McKay and Mr. Yeiser in there?

A. Yes, they were there.

Q. Was Mr. Yeiser dressed in his regular deck costume?

A. Mr. Yeiser usually wore his pajamas pretty nearly all of the time on the boat and he had them on then.

Q. When this colored boy came for you did he tell you he had seen him? Did he tell you who had sent him?

A. Mr. Yeiser.

Q. What time of morning was that, Captain, that you were called and went below to this aft cabin and found the young ladies?

A. I never looked at my watch right then, but it was about an hour and fifteen minutes after I had taken up anchor and started. You might find that time on the log book, because the Chief taken the time.

Q. Was an accident of that sort such as one as should be timed?

A. No, sir.

Q. On the log book I mean?

A. No, sir.

Q. Do you recall what part of the shore you were opposite?

A. I was nearing Cape Florida but had not got off of it. You might remember, if you have been down there, that there is a big white beacon off to the middle of the bay out there—

Q. I think so.

A. I was coming near to that.



Q. About how far is that south of Royal Palm Dock?

A. I don't know off-hand. I would have to look at the chart. I never make guesses.

Mr. Mershon:

At this point I would like to inquire of counsel if he has completed his direct examination or whether you intend to inquire of him about the chart?

Mr. Parmer:

To tell you the truth, I had forgotten about the chart. I will do that later.

642 Mr. Mershon:

I wanted to examine on that at this time, but if counsel doesn't have it here—

Mr. Parmer:

I will try to get the chart by Monday. I do not have it here.

By Mr. Mershon:

Q. Captain, do you recall whether it was cold on that trip?

A. Well, it was pretty chilly that morning.

Q. Were the young ladies covered up; did they have blankets on them?

A. They had blankets on them.

Q. They did?

A. They had spreads over them; I know that they were covered up to here (indicating) when I saw them.

Q. If it was cold Mr. Yeiser probably had his bathrobe over his pajamas?

A. He usually wore his pajamas and his bathrobe, yes.

Q. Now you said you talked to Mr. McKay after you brought the ladies out on deck and before you anchored

at the Royal Palm Dock, and I believe you said Mr. McKay told you to say nothing about it and to inform all of the crew?

A. Yes, sir.

Q. Was Mr. Yeiser present when Mr. McKay told you that?

A. No, sir.

Q. Did Mr. Yeiser confirm that order to you?

A. Mr. McKay did.

Q. Did you take orders from Mr. McKay on  
643 that boat?

A. I did at that present time because I thought a lot of him, and I just figured that he didn't want the crew or anybody to know that they were sick or anything had happened to them. I didn't know what it was all about.

Q. In other words, you did not attach any special significance to the request, did you?

A. No, sir. If he asked me to do on the boat it was always done, and Mr. Yeiser gave me orders to please him.

Q. It is the duty of a discreet captain on any private yacht not to give forth to the public anything that happens aboard his ship?

A. Yes.

Q. And you would have done the same thing if Mr. McKay had not made any request?

A. The first thing I would have tried to do was to get the girls to the hospital if I hadn't had these orders.

Q. The first thing you did was to call a doctor?

A. Yes.

Q. Mr. McKay did not tell you not to call a doctor, did he?

A. No, sir.

Q. Would you have discussed that matter or allowed your crew to discuss it even if Mr. McKay had not asked you not to?

A. Of course not.

Q. What he asked you wasn't anything out of the ordinary at all, was it?

A. I didn't take it that way.

644 Q. Where was Mr. Yeiser at the time that you were talking to Mr. McKay?

A. I don't know.

Q. He was up on deck somewhere?

A. I don't know where he was at; I couldn't say where he was at; I don't know where he was.

Q. Where were you when you had this little conversation with Mr. McKay?

A. In the pilot-house.

Q. He was up in the pilot-house with you?

A. Yes, sir.

Q. Could you be mistaken in your recollection that Mrs. Just left the Friendship II about eleven o'clock in the morning; are you positive about that?

A. That she left there at what time?

Q. Eleven o'clock in the morning.

A. In the afternoon.

Q. Mrs. Just I am talking about.

A. Excuse me, I could be exact just what time it was but we got her off as quick as possible.

Q. You didn't mean to be positive about it when you said it was eleven o'clock, did you? In other words, that is your best recollection?

A. Yes, I figured that would be about right.

Q. You said that you were very busy after you got to port?

645 A. Yes.

Q. What were you doing?

A. Tying up my boat and the two small cruisers.

Q. How long did that take?

A. Probably took 30 or 40 minutes and getting hold of the Chief and getting hold of Chubby and telling them not to mention anything about these girls being sick.

Q. Had you given orders to Chief Blount to get Mr. Roderick down there to look at the boat and make an estimate?

A. Not that quick.

Q. Where did you find Chubby?

A. On the deck; he came up on the other side of the second-deck.

Q. Now when that day did you tell Chief Blount to have Mr. Roderick come aboard?

A. I didn't tell him until way that late; I don't know what time it was, but we had him.

Q. You did that in pursuance of Mr. Yeiser's orders, did you?

A. Yes, sir.

Q. Had Mr. Yeiser on other occasions discussed with you changing the pipes so as to make them run up through the stack?

A. Yes, sir; that was his intention of doing it.

Q. How long had he had that intention as reflected in his discussions with you?

A. I don't know just exactly when he did tell me about it.

Q. As well as you recall. You know something about; just tell us the best you know?

A. Well, I know it was somewheres around  
646 September that the boys got knocked out that time.

Q. September, 1935?

A. Yes.

Q. Was it about the time these two children were affected by gas on that boat?

A. I think it was.

Q. And he had delayed from that time until March 2, 1936, without doing anything definite about it?

A. Yes, sir. His intention was to lay up in the summer and put it in.



Q. Where was the Friendship II when you picked Mr. Yeiser's own little son up off the dining-room floor on this yacht when he was overcome by gas?

A. On the West Coast.

Q. Were you on a trip?

A. Yes, sir.

Q. Where were you going from the West Coast?

A. Down in the Shark River country.

Q. Was it daylight or dark?

A. It was daylight.

Q. Where was the other little boy—not the one you picked up off of the floor but the other one?

A. I don't know where he was at.

Q. Was he lying in one of the bunks in this big room?

A. I don't remember; I was called up there by this little fellow—after a while they told me that this  
647 / fellow, this boy, came out there sick. I went back aft afterwards and found the two of them back there sick.

Q. It was then that Mr. Yeiser discussed running the exhaust pipes up through the stack?

A. He started talking about it.

Q. Was it at that time that he had you see Loftin of Loftin's Boatyard and get the estimate on changing those exhaust pipes?

A. No, sir.

Q. Did you ever get an estimate from Loftin on the cost of replacing the exhaust pipes or changing the exhaust pipes in the Friendship II?

A. It seems to me like we did but I don't remember when it was.

Q. What was the occasion of getting such an estimate from Mr. Loftin?

A. When this question was brought up it was I believe after Mr. Yeiser's death that Mr. Loftin tested these pipes and was going to give an estimate; I don't remember that he ever gave the estimate.



Q. Do you say positively that you did not consult with Loftin of Loftin's Boatyard and ask that they estimate on the cost of installing new exhaust pipes or changing the exhaust pipes until after Mr. Yeiser's death?

A. I don't remember whether it was before or after.

Q. You don't remember whether it was before or after?

A. No, sir. I would have to date the date on  
648 that; that has been a long time ago.

Q. At whose request did you procure that estimate from Loftin's Boatyard?

A. What?

Q. Who ordered you to get that estimate from Loftin's Boatyard?

A. I guess it was through the estate.

Q. Didn't Mr. Yeiser ask you to get the estimate?

A. I am not sure who it was; I got my orders from three or four. I could look up and probably find out.

Q. You say you got orders or estimates?

A. Orders. I had about three bosses you know.

Q. You always had to have Mr. Yeiser join in with the others, didn't you?

A. Sometimes.

Q. Who was accustomed to give orders to you to do these things, such as getting estimates for major repairs on the boat?

A. He did part of the time, and I probably got some from Mr. Balsh and Miss Alma Chambers.

Q. They were also as familiar with the condition of the boat as he was?

A. No; they were not as familiar with the boat as he was.

Q. So who to the best of your recollection ordered you to get an estimate from Loftin's Boatyard for repairing the exhaust pipes or replacing them?

A. I don't remember just who it was.

Q. But someone did; you are sure of that?

649 A. Yes, I am sure that there was an order; I don't know whether it was after his death or not; it might have been.

Q. You would not have done that without an order from somebody over you, would you?

A. Sure not.

Q. Who controlled and supervised the movements of the Friendship II while you were captain of her when Mr. Yeiser was aboard?

A. Mr. Yeiser.

Q. How did this little boy of Mr. Yeiser's act when you picked him up off the floor in the dining-room?

A. He acted like a seasick person to me; it was very rough. I just don't know.

Q. Did you stand him on his feet?

A. No; I took him up and laid him down on the back deck.

Q. Did he vomit?

A. I don't remember.

Q. You didn't stay back there with him?

A. No.

Q. Who stayed there with him?

A. Mr. Yeiser; I remember him covering him up at the time.

Q. Did you see the other little boy come out?

A. No, I didn't see him come out, but he was there for a while; I went back there in a few minutes.

Q. Was this little boy that you picked up unconscious?

A. No, sir.

Q. What did he say?

650 A. He didn't say anything; the little fellow didn't talk much. I believe the first thing he said was that he had a terrible headache; that is what he told his father.

Q. Did he undertake to stand up?

A. Not then; he laid down and slept a little while, and it was not long until he was running around on the deck

that afternoon. I don't believe he ate a very big dinner that night but the next day he was all right.

Q. Have you ever seen any one seasick on deck and trying to walk?

A. Yes, sir.

Q. Did they walk in a nice straight line?

A. They didn't walk so good.

Q. If you saw them from behind and didn't know they were seasick, would you think—

A. In rough weather I would say he was drunk.

Q. What is the difference at a distance from a man who is seasick walking along a sidewalk and a man who is partly drunk walking along a sidewalk?

A. I don't know; you don't get seasick on the sidewalk.

Q. Can you tell us the difference, if any, between the movements of a man that is seasick and the movements of a person who is apparently under the influence of alcohol?

A. I never noticed them that close.

Q. You are not a specialist in either one?

651- A. No, but I can tell when a fellow is drunk or seasick.

Q. Do they look somewhat alike in their movements to you?

A. No.

Q. What is the difference in them?

A. Well, the fellow that is drinking has a lot more to say than the fellow who is plumb seasick.

Q. Well, when they are partly sick and partly drunk—

A. The man who is seasick doesn't have much to say to anybody, and he would rather be left alone, but the one who is drinking you can always notice that he wants to talk to everybody.

Q. You are talking about the way they feel. I am talking about the way they walk.

A. I am talking about the way they looked and the way they always talked to me. That is the only way I know how to answer you.

Q. I believe you said the exhaust pipes on the Friendship II during this period of time that you were captain on her would throw fumes up over the boat, that the fumes would come up from the stern when conditions were right?

A. Yes.

Q. What do you mean by conditions being right?

A. Well, it would take a side wind or a stern wind.

Q. You mean if the wind came from the same direction in which the boat was going, the fumes would come up from the stern of the boat?

652 A. It wasn't so bad, but if you got a good head wind you would get some back on the stern there.

Q. Then conditions were right all of the time for gas to come on the boat?

A. It was worse at times.

Q. What do you mean by "when conditions are right"?

A. To make anyone sick. The only time I ever noticed it would be when the wind was plentiful—

Q. Do you want to change your testimony or your statement that the gas would come over the stern because of a head-wind?

A. There wasn't much, but there would be some.

Q. Would there be any in your bunk in your stateroom when you were running against a head wind?

A. I don't know; if so, I don't remember it; I was running so much at night that—

Q. When you were running into a head wind and when the back windows of this stateroom, double stateroom, were closed, you would not get any fumes from the exhaust pipes in that aft stateroom?

A. I never did go down there to examine it but possibly you could.

Q. Did you report that to Mr. Yeiser?

A. I never reported it at all, but he knew that as well as I did.

Q. He knew that you got fumes in that stateroom under certain conditions?

653 A. He knew about it and he always told people to keep those windows closed. He was worried about that.

Q. What was he worried about?

A. One morning he went down there and he called these girls—I have an idea that is what he went down there for—and probably they were sleeping, and he was the one that closed the windows probably.

Q. When was that?

A. That was this same trip.

Q. Which morning?

A. Monday morning.

Q. Monday morning?

A. Yes, sir.

Q. Do you know which direction the wind was coming from on the night of Sunday, March 1st, from the time you left Angel Fish Creek until you anchored at Feather-bed Shoals?

A. Coming back to Miami that night?

Q. Yes.

A. As best I remember it was just a northeast wind.

Q. What was your general course?

A. That night?

Q. Yes, the first night coming back to Miami?

A. I don't get that.

Q. Was it about a northeast course?

A. You might say so.

Q. Is that right?

A. Probably.

654 Q. And you were running directly into a head wind?

A. Yes, sir.

Q. Therefore there would be no fumes from the exhaust pipe going into the staterooms from the back windows under those conditions?



A. No, sir.

Q. Now on Monday morning what would your course be from Featherbed Shoals up to the Cape Florida light about where you first discovered these ladies in their bunks unconscious?

A. Well, to tell you the truth if I was going to take that trip now I would get my chart out and I would get my course in that manner.

Q. Yet you are a Master pilot?

A. Yes, but a Master pilot doesn't run by guesses. We don't try to remember these things. We do our work every day and we take our course every day.

Q. You do it anew every time and you do not try to remember anything—

A. That's right.

Q. Captain, do you mean to say that you do not know what direction you would lay your course in coming from Featherbed Shoals up to the point where you got off Cape Florida Light where these ladies were found in their bunks?

A. Do you mean the ordinary general course?

Q. Yes.

655 A. North.

Q. Do you know from what direction on the morning of March 2nd, Monday morning, the wind was coming?

A. I couldn't give you just the exact point that the wind was at that particular time that morning, but it was blowing right against the stern, right across the stern.

Q. Would a certified copy of the Weather Bureau's chart for that day refresh your memory?

A. Probably would.

Q. Now just to refresh your memory I show you a paper and will ask you to examine it and see if it refreshes your memory as to the direction of the wind between the hours of seven o'clock A. M. and nine o'clock A. M. on Monday, March 2, 1936.

A. I couldn't tell you just where the wind was.

Q. You say that after examining that chart?

A. Yes. She was on the side of the boat; I was coming north. Now the wind was about northwest, or somewhere in there.

Q. That is your best recollection?

A. Maybe further to the west than to the north.

Q. Were conditions right in your opinion for the gas fumes to come into the bedroom, over the stern of the boat into that stateroom?

A. She could have taken gas there just as good as any other times.

656 The Court:  
Is that all?

Mr. Mershon:  
At this time, your Honor.

The Court:  
We will take an adjournment now until 7:30.

657 Miami, Florida, October 13, 1937, 10:00 A. M.

The Court:  
All right, gentlemen, we will proceed now.

Mr. Parmer:  
Your Honor, I have a memorandum which I would like to give you at this time.

Mr. Mershon:  
If your Honor please, we have a memorandum upon the same question..

The Court:  
Have you seen a copy of this?

Mr. Mershon:

Mr. Parmer has just handed us a copy, but over the week-end he was good enough to give us the citations, and we have prepared a memorandum which will be over here after lunch, at which time we will give Mr. Parmer a copy.

The Court:  
All right.

Mr. Mershon:

I would like to have Captain Roberts take the stand.

Thereupon, CAPTAIN FREDERICK ROBERTS resumed the stand and testified further as follows:

Re-Cross Examination.

By Mr. Mershon:

Q. Captain Roberts, you testified on direct examination, did you not, that you burned the so-called log of the Friendship II which you were causing to be kept on or about January 1, 1936?

A. No, I didn't say I burned it; I said I burned all of my bills. After we got this new log-book I don't know what became of the other one, because it wasn't  
658 any more use to us.

Q. What was the purpose of keeping the log-book as you kept it prior to January 1, 1936?

A. Well, if we knocked a propeller blade off or if we had any kind of an accident, we would have to tell the exact spot where it happened.

Q. Did the insurance carriers require that you keep such a record?

A. Yes.

Q. Did they insist upon their right to examine your record from time to time?

A. Whenever there was an accident.

Q. When you would make a claim?

A. Yes.

Q. Now what period of time did that log, which is now missing, cover?

A. It only covered any time there was an accident.

Q. My question may not have been clear. The log that you now identify and which is in Court at this time covered a period from January 1st on up to the time you severed your connection with the boat. Now, Caption Roberts, what period of time ending with January 1, 1936, did the log cover, that is, the log which you say was lost or that you cannot find?

A. I don't know exactly how much it covered.

Q. Did you ever have another log-book similar to the one which is in evidence, other than this one which is in evidence and the one which you say was lost, as a log-book for the Friendship II?

659 A. No, sir.

Q. So from the time Mr. Yeiser acquired the Friendship II you did keep a similar log-book to the one that is in evidence?

A. Yes.

Q. Which covered the movements of the boat up to January 1, 1936?

A. Yes, sir.

Q. Now when was the last time that you individually and personally saw or knew anything about the previous log-book ending January 1, 1936?

A. Sometime in December we were over here at the Flamingo Dock and the Chief said he was going to get another log-book. I told him it was all right to get another one or start any other one that he wanted to.

Q. After you severed your connection with that boat and the Yeiser estate, was there any reason for keeping this log book?

A. I was going to use it on my small sailboat. I believe I started in it with the boat I have now. I believe you will see my signature there. You can see it; it is very hard reading, because it is poor writing, and I don't know whether you can read it or not.

Q. Did the other log-book have entries in it right to its back pages, the one that was lost?

A. I suppose it was just like that one that you see right there.

Q. No. I am asking you whether the other log-book was full of entries right to its back pages, the one that was lost?

A. Sometimes the Chief would probably want  
660 to use a page for something else, and we didn't have to carry the book that way. To tell you the truth, I never noticed it closely; it was only carried for any trip we might have made; in other words, if we had an accident then we could use it.

Q. You said the log-book which was lost was your personal property?

A. It was all my personal property, yes.

Q. You made no effort then to keep Chief Blount from throwing it away or doing whatever he wanted to do with it?

A. I didn't need that book any more.

Q. Did you authorize him to destroy it?

A. I don't know what he did with it.

Q. Did you give him authority to throw it away or do whatever he wanted to do with it?

A. No, sir.

Q. Why would he throw your personal property away without your knowledge or consent?

A. He "knowed" I was through with it.

Q. Yet you did not tell him you were through with it, did you?

A. No.



Q. Do you remember the occasion in October of this year when you testified that you refused to allow Mr. Mershon and Mr. Mehrtens, the attorneys for Mrs. Just and Miss Grunow, who were aboard the Friendship II at Fort Myers, to see the log-book?

A. Yes, sir.

661 Q. Now what book was that that you refused to let them see?

A. It is the book I had here in my hands the other day.

Q. You didn't then have the log-book?

A. No, sir.

Q. Did the old log-book contain any entries or any reference to the time when Mr. Yeiser's two little boys suffered from the effects of carbon monoxide gas on that boat?

A. The Chief could tell you.

Q. You never made any such entries?

A. No.

Q. Where was the log-book kept; I mean at what spot on the boat?

A. In the engine room.

Q. It was not kept in the pilot-house?

A. No, sir.

Q. It wasn't kept in the Captain's cabin or the wheel-house?

A. No, sir.

Q. That morning when Mr. Mershon and his party were on the boat, however, this log was in the wheel-house or in the Captain's cabin, wasn't it?

A. Yes, sir.

Q. Did you make a practice of examining that log or checking up on it to see if it was accurate in its recitals?

A. No, sir.

Q. I believe you said that about January 1, 1936, you burned a lot of bills that you had for that boat?

A. Yes, sir.

662 Q. Did you clean house then of all records  
you had concerning the boat about January 1,  
1936?

A. Yes, sir.

Q. Now, Captain, what repairs of a substantial nature  
were made upon the Friendship II at Fort Myers at  
Loftin's Boat Yard shortly after Mr. Yeiser bought the  
Friendship II?

A. I would have to get all of my bills to show you  
that; I don't remember.

Q. You don't have the bills, do you?

A. No, sir.

Q. And you have absolutely no recollection of this boat  
being in Loftin's Boat Yard?

A. Yes, sir.

Q. Did they replace planking at the stern of the Friend-  
ship II?

A. Yes.

Q. How much planking did you have to replace there  
on the stern of the Friendship II?

A. There was about six little planks about that wide  
(indicating), I guess, and about that long, (indicating);  
I don't know the footage of it.

Q. Did you lay her in dry-dock to do that?

A. Yes, sir.

Q. Indicate on this blue-print, Petitioner's Exhibit No.  
3, about where the planking was replaced on the bottom  
of the boat at that time; use the outline at the bottom  
of the page rather than this here (indicating).

663 A. Right here (indicating).

Q. Did the propellers project beyond the stern  
of the boat?

A. No, sir.

Q. The propellers are somewhere near the aft part of  
the after stateroom?

A. Yes.

Q. How many feet do you say in length, measuring from the forward to the aft part of the boat, was replaced?

A. I am no carpenter, but my judgment is that it was probably three feet, right over the wheel there.

Q. Why was this planking replaced?

A. Well, we had some iron ballast on there.

Q. Ballast?

A. Yes.

Q. What was the size of that ballast?

A. It was just small window weights and little pig-iron.

Q. How long did she lay in dry dock at Loftin's Boat Yard on that occasion?

A. The boat was up there about eight days to the best of my memory.

Q. What other repairs, painting or other work, was made on the boat at that time?

A. Painting throughout.

Q. Was the boat stripped for painting?

A. No, sir.

Q. Was the furniture removed?

664 A. No, sir.

Q. Were the hatches raised up?

A. No, sir.

Q. The hatches were not removed on the lower deck?

A. No, sir.

Q. Was she painted inside the bilge?

A. No, sir; just aft.

Q. Sir?

A. In the after stateroom.

Q. So these hatches were raised?

A. Yes, these hatches were raised in the after stateroom.

Q. What, if anything, did Loftin's do in the way of work on the engines?

A. Loftin's?

Q. Yes.

A. They didn't work on the engines.

Q. Wasn't it at that time that you asked Loftin's to give Mr. Yeiser an estimate on the cost of replacing these exhaust pipes?

A. No, sir, not that I remember.

Q. You say it was not?

A. Not that I remember.

Q. Do you remember ever asking Loftin's Boat Yard for an estimate on replacing the exhaust pipes?

A. Yes.

Q. When was that?

A. That was after Mr. Yeiser's death.

665

Q. Not until after Mr. Yeiser's death?

A. No, sir.

Q. How much time did you spend around and in the Friendship II while she was in dry dock at Loftin's Boat Yard?

A. Every day she was on the dry dock.

Q. Who authorized you to get the estimate from Loftin's for replacing the exhaust pipes after Yeiser's death?

A. I don't remember who authorized it.

Q. Do you say, Captain, positively that you never discussed with Mr. Loftin, of Loftin's Boat Yard, the matter of replacing the exhaust pipes on the Friendship II until after Mr. Yeiser's death?

A. Yes, sir.

Q. Did you say that after Yeiser's sons were overcome by this gas in September, 1935, that Mr. Yeiser then stated he wanted the exhaust pipes run out through the stack?

Mr. Parmer:

I think that question is confusing, because it is predicated upon a statement after Mr. Yeiser's death.

The Court:

Read the question.

(Thereupon the preceding question was read by the Reporter as above recorded.)

The Court:

You were asked if you testified in your former testimony that after the boys were overcome or affected by this carbon monoxide gas in September, 1935; whether or not you said at that time that Mr. Yeiser wanted to replace these exhaust pipes by putting them overhead.

The Witness:

That was his intention.

The Court:

Now when you answered it was in 1935 you gave the time. Now the question was did you say that?

The Witness:

Yes, sir.

(By Mr. Mershon):

Q. Did Mr. Yeiser express that desire and intention to you in September, 1935?

A. Yes, sir.

Q. Did Mr. Yeiser then instruct you to get estimates from the various people as to the cost of doing that?

A. Not at that time.

Q. Did he make any effort through you or otherwise as far as you know, to have anything done about changing or replacing the exhaust pipes between the time his boys were overcome and the time these young ladies were found ill on the boat on March 2, 1936?

A. No, sir; all he said was that he was going to do it; his intention was to take them out and fix them in the summer when we were laid up.



Q. He procured no estimates and made no efforts to do anything about it prior to March 2, 1936, is that right?

A. Not until after all of this trouble came up. We got the estimates right at the dock down here from some party—I don't know who it was—to put the exhaust up through the stack.

Q. These estimates that were gotten from Roderick were gotten on March 2, 1936, while Mr. Yeiser was still alive?

667 A. Yes.

Q. And they were gotten then at his direction, were they not?

A. Yes, sir.

Q. I believe you stated that he told you that those exhaust pipes must come out and be changed through the stack?

A. Yes.

Mr. Mershon:

That is all.

#### Re-Direct Examination.

By Mr. Parmer:

Q. Captain, when Mr. Yeiser's family came on board the boat during the Christmas holidays of 1936, who was in the family party at that time?

A. Mrs. Yeiser, her two boys and the nurse.

Q. How long were they on the boat?

A. Two weeks.

Q. Now, Captain, will you tell us all of the circumstances as you know them with regard to your refusal to allow Mr. Mershon and Mr. Mehrtens to make an inspection of the Friendship II in October of 1936, or whenever it was. Will you please tell us that in your own way?

A. I did not happen to be on the boat at the time these gentlemen came down to the boat, but I was to have

the boat ready at 1:00 o'clock for the sale or auction, or whatever it was, and when I came down these gentlemen had the whole floor on the boat turned up, going through it; they looked to me like they were racketeers; that's what

I thought; and then they ran over to me with  
 668 a letter. I didn't know anything about the letter, and I told them that the boat could not be torn up that way, and that they couldn't do it.

Q. What time was that?

A. Around 12:00 o'clock.

Q. When was the sale going to take place?

A. At 1:00 o'clock.

Q. Now had you received any word on the previous day from Mr. Woolsler with regard to Mr. Mershon and Mr. Mehrtens coming aboard the boat?

A. The day before.

Q. Had you received word from him that someone was coming there to inspect the boat?

A. Some lawyers from Miami.

Q. What instructions did he give you?

A. He told me he would let me know when they came.

Q. Did he let you know when they came?

A. No, sir.

Q. What general instructions did you have with regard to preparing the boat for the auction?

A. To have her in nice shape, in as nice a shape as I could get her in.

Q. Prior to Mr. Mershon and Mr. Mehrtens coming on the boat had you done anything to put the boat in nice shape?

A. I had, and the rugs were all laid—

Q. What was the reason for your refusing to allow  
 669 Mr. Mershon and Mr. Mehrtens to examine the boat?

A. Because I wouldn't have time to get the floor put back by 1:00 o'clock and have the boat ready when they came down, and Mr. Woolsler gave me orders to let no one tear the boat up at that time.

Q. Did you, following your conference with Mr. Mehrtens and Mr. Mershon, speak to Mr. Woolsler?

A. I went up with this little fellow right here (indicating Mr. Mehrtens).

Q. You mean Mr. Mehrtens, the smaller gentleman?

A. Yes.

Q. All right.

A. I went up to phone Mr. Woolsler and Mr. Woolsler told him he would be down, as I remember it.

Q. How long after that did the auction take place?

A. It started somewhere around 1:00 o'clock; it was set for one o'clock.

Mr. Parmer:

By mistake, we neglected to bring certain charts, so we will have to send to the office for them.

The Court:

All right.

Mr. Parmer:

There are certain matters concerning them I wish to recall the witness on.

Mr. Mershon:

May I cross examine the witness further?

Mr. Parmer:

Yes.

By Mr. Mershon:

Q. At the time that you refused to let Mr. Mershon and Mr. Mehrtens and Mr. Worth Monroe look  
670 at the exhaust pipes on the boat, couldn't you have simply allowed them to lift the hatches up and look at the exhaust pipes and put the hatches back?

A. Well, I would have had to take the rugs up; you know, the rugs were all down.

Q. There were no rugs in the bathroom.

A. Yes, there were rugs in the bathroom.

Q. On that day?

A. No, there were no rugs in the bathroom; that is a tile floor.

Q. You wouldn't even allow them to put their finger in the hole in the little hatch in the bathroom and raise it up.

A. They didn't ask me to.

Q. You told them that they couldn't go through the boat and look at it?

A. Yes.

Q. You knew at that time that the patches were on those exhaust pipes and that an inspection would show that they were there?

A. Yes.

Q. You knew then that despite the letter to you from Mr. Woolser, the Trustee, that you were preventing Mr. Mershon and Mr. Mehrtens and Mr. Monroe from seeing these patches as they then existed on the exhaust pipes?

A. No, sir.

Q. You didn't know that the effect of your action would prevent them from seeing those exhaust pipes and finding the holes in them?

671 A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. Your only purpose in preventing them from examining these exhaust pipes and finding out their condition was that you had put the ship in shape for the coming sale?

A. Yes, sir.

Q. When you say the bathroom has a tile floor, do you mean a linoleum?

A. Yes, linoleum tile.

Q. And the hatch in the bathrcom was also covered with linoleum tile?

A. Yes.

Q. It would be a simple operation to raise that little hatch up and look down in the bilge?

A. You didn't ask me that.

Q. I am asking you now if it would not have been a simple operation there?

A. If you wanted to look through the boat?

Q. Yes.

A. Why, the hatches would all have to be taken up.

Q. I am asking you now if in a half-minute's time or less you couldn't raise the hatches in the bathroom without removing any rugs, and at least to that extent have exhibited to us a part of the exhaust pipes?

A. That wasn't explained to me.

672

## Re-Direct Examination.

By Mr. Parmer:

Q. When you got there what did you observe with respect to changes which had been made in the vessel since you had last been on it?

A. I observed that the rugs in the hallway had been rolled up and the hatches were being removed.

Q. How many hatches were being removed?

A. I never noticed how many it was. I didn't want any removed.

Q. Well now had you been informed on the day before as to what time to expect Mr. Mershon and Mr. Mehrkens?

A. They were to be there that morning, but they didn't stay any time.

Q. You saw them that morning?

A. Yes.

Q. What time of the day did they arrive?

A. They were around the boat about 12:00 o'clock.

Q. Twelve o'clock?

A. Yes.



The Court:

Who told you that they would be there that morning?

The Witness:

Mr. Woolsler.

The Court:

You said something about a telephone conversation with Mr. Woolsler. I am trying to get that straight in my mind. Did you testify that Mr. Mehrtens called up Mr. Woolsler?

673 The Witness:

Yes.

The Court:

Do you know that?

The Witness:

Yes.

The Court:

How do you know that?

The Witness:

I was standing right there with him.

By Mr. Mershon:

Q. After you had refused to allow us through the boat in pursuance of Mr. Woolsler's letter, did Mr. Mehrtens go with you to a telephone and talk to Mr. Woolsler in your presence?

A. Yes, sir.

Q. And Mr. Woolsler talked to you for sometime?

A. Yes.

Q. Over the telephone?

A. Yes.

Q. Had you heard earlier in the day from Mr. Woolser?

A. No.

Q. You had not talked with him earlier that day?

A. Not that I remember of.

By Mr. Parmer:

Q. Captain, were you present in August of 1936 when the test was made on the pipes on the Friendship II?

A. Yes.

Q. When Mr. Coleman and the chemist were there?

A. Yes, sir.

Q. Well now did you make any of the preparations which were made for the tests which were made?

674 A. Only to help close the window.

Q. What did you do with regard to the windows on the boat?

A. Well, that morning I opened the boat all up and aired her out. Mr. Coleman came down before we made the tests and he asked me to see that all of the windows were closed.

Q. Did you do that?

A. Yes.

Q. Did you close some of them yourself?

A. Yes.

Q. Who closed the rest of them?

A. The Chief helped.

Mr. Parmer:

Now, the only other matter I have is the one which I believe I mentioned before, that is, the chart.

Mr. Mershon:

You can prove that any time.

By Mr. Mershon:

Q. Captain Roberts, what time of the day was this test started in August, 1936?

A. I didn't take the time.

Q. Were you there?

A. Yes, sir.

Q. How long had it been since the Friendship II had been run or operated prior to the making of the tests?

A. I don't know what you mean, but we run those engines once a week very nearly all day long. The Chief would be on the boat and he would go down and start them and run them and operate them steady.

Q. How long had it been since the engines had been operated by Chief Blount before you made this test?

A. It could not have been over five or six days at that time.

Q. Do you think it was at least five or six days?

A. Yes.

Q. You said you first opened all of the windows, opened the windows up.

A. I did that every day.

Q. Did that include raising the hatches?

A. No, sir.

Q. How long had it been since you had raised the hatches?

A. I kept those hatches open.

Q. You kept those open all of the time?

A. Yes.

(Witness excused.)

been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Farmer:

Q. Mr. Coleman, in August of 1936 did you go to Fort Myers for the purpose of making a test with regard to the exhaust pipes on the Friendship II?

A. I did.

Q. Will you tell us what you did in that connection?

A. I got to Fort Myers sometime in the forenoon and I met Mr. Walker there. I had made arrangements to meet Mr. Walker there, and we went down to the boat, and he had the windows on the boat closed. He had the engineer start the motors up and get them working smoothly, and after waiting for some little time, fifteen or twenty minutes, we then began the tests that Mr. Walker has already testified about. First we began the test in the after-stateroom, closed the door and windows and all of the doors inside, the closet door, and closed the outer door very tightly, and had this small flexible rubber hose which ran from the hallway into the interior of the room, and the engines then were running as instructed. I had instructed Engineer Blount to make the same rate of speed he was making at the time of this accident.

Q. Mr. Coleman, before you go further I want you to examine Petitioner's Exhibit No. 3 and refer to  
677 the after-cabin as shown there, and will you tell us what doors and windows of the interior of that cabin you closed?

A. We closed the door to the hallway, and we closed all of the windows in the cabin and we closed the closet doors.

Q. What about the bathroom doors?

A. And we closed the bathroom door.

Q. Now, what was the purpose of closing all of the windows on the boat?

A. The purpose of it was to get as great a degree of concentration as possible; in other words, I wanted the test to be made under conditions that might be more than unfavorable to us, because what I was trying to do was to get a test as near as I could that would indicate the concentration of the gas in the room.

Q. You mean the maximum concentration?

A. Yes.

Q. What was the idea of closing the closet doors and the bathroom door inside the room?

A. I don't know of any particular reason now that I had in mind for closing them. I don't remember just what my reason was.

Q. Will you continue on from there with regard to the test or tests?

A. Then we continued the running of the motors for a period of two hours and twenty minutes.

Q. For what reason did you run them for two hours and twenty minutes?

678 A. That was, as I understood it, the elapsed time of the trip, from the time the Friendship II had left its mooring, that is, where it was anchored, to the time that it docked in Miami.

Q. Where did you get that information?

A. I got that information from previous conversations that I had with Captain Roberts and the engineer.

Q. Now at the end of that two hours and twenty minutes what did you do?

A. Then Mr. Walker got the end of the pipe that had protruded out in the hallway and sucked out the air that was there in the end of the small pipe and the interior of the after-stateroom, and put that in his bottle and he was going to use it for the purpose of his test after he got back to Tampa.

Q. After he did that did anybody go in the room?

A. Yes, after that of course we opened the door and we both went in the room.



Q. You know that you did go in the room?

A. Yes.

Q. When you got in the room did you smell or see anything?

A. Yes.

Q. What?

A. I saw a grayish smoke similar to that that you see in a garage after the exhaust of an automobile had been running for sometime.

Q. Did you smell anything?

A. Yes, it was some kind of an odor, the same kind of an odor that you smell in a garage from an  
679 exhaust pipe.

Q. Did you make any other tests?

A. After that we made this test that the Chief testified about, that is, putting the hose underneath the exhaust pipe and running it into the bottle.

Q. What was the purpose of that test?

A. I do not know precisely what the purpose was; that was a test that the chemist suggested, but the exact purpose of that I do not know, except that I understand he wanted to get the rate of flow, however, I am not acquainted with the technique of it.

Q. Well now, who held the watch on this first test that you mentioned?

A. I held the watch.

Q. The one in which you were trying to find out how much carbon monoxide gas would get into the after-stateroom?

A. I did; I held the watch in both tests.

Q. Now prior to making this test to find the concentration in the after-stateroom, had anything been done to the hole in the pipe, that is, the hole in the exhaust pipe on the port side which had been leaking originally?

A. Yes.

Q. What was done?

A. Nothing was done except to leave it free.

Q. Left it free?

A. Yes.

680 Q. Was it allowed to be free during the whole period of the two hours and twenty minutes?

A. Yes.

Q. Now, during the time that this test was going on, that is, during the time that the motors were running two hours and twenty minutes, where did you and the chemist, or whoever else was around there, stay?

A. We went up on the deck; I think it was the after-deck—Captain Roberts, the engineer and Mr. Walker and myself. We stayed around there and waited for the passage of time, until the two hours and twenty minutes elapsed, according to my watch, and then we went down below.

Q. Now, did anybody measure the room at that time?

A. No.

Q. Did you arrange to have the room measured later?

A. I did.

Q. By whom?

A. Captain Roberts.

Q. Did you receive from him a report with regard to the measurements of the room?

A. I did.

Q. What did you do with that report?

A. I transmitted that report to Mr. Walker.

Q. After you transmitted it to him did you receive information from him with regard to the concentration of gas in the room?

A. I did.

581 Mr. Parmer:

I think that is all.

## Cross Examination.

By Mr. Mershon:

Q. Mr. Coleman, did the chemist, Mr. Walker, transmit to you a copy of the report that he made here in Court the other night?

A. I don't know whether it was an exact copy, but I have the copy that he sent me.

Q. His report showed that the motors had been operated two hours, didn't it?

A. Yes, I think that is correct. I think he made a mistake in his statement because I am very positive of the fact that it was two hours and twenty minutes.

Q. Didn't he double-check the time with you?

A. No, sir, he wasn't interested in the time particularly; he was depending upon me to keep the time. He was interested in his paraphernalia which he had brought with him that morning.

Q. When this flexible hose was run into the stateroom just where in the stateroom would the end of the hose be; refer to the floor plan of the boat, Petitioner's Exhibit No. 3, and indicate that to us.

A. My best recollection is that the head of the test hose was located at the head of the bed on the port side of the cabin.

Q. How was it kept in place there?

A. Just lying on the floor.

Q. It was lying on the floor?

682

A. Yes.

Q. In other words, it wasn't put up on the bed where the ladies' heads would have been in the bed?

A. It was on the floor.

Q. Now was the door closed tightly while the gas was being put into this stateroom through the vents in the bilge?

A. Yes.

Q. There was no crack in the main door going into the stateroom?

A. No.

Q. How did you get the gas-air out of that stateroom without opening that door?

A. After we finished the two hours and twenty minutes of test we opened the door a trifle bit, just enough to release the pressure on the tube.

Q. Also that would release the gas pressure or the concentration in the room—

A. It was a very, very slight release that was made; in other words, we kept it closed as tightly as possible.

Q. In other words, there was enough release to permit a flow through that hose?

A. All I can tell you is that it was a very slight release. You will have to form your own conclusions.

Q. How long did the chemist let the air flow through that hose without opening the door?

A. I don't know. I know that he drew a small sample out.

683 Q. You don't know?

A. No, sir.

Q. Can you say that he did not include in the sample that he drew from the room the air unmixed with the contents of the room, which air was in the end of the hose which had stayed outside of the stateroom?

A. I am sure he did not do that.

Q. What kind of a container did he draw that sample into?

A. A glass; I think it was a glass bottle.

Q. I am interested in knowing how he pumped or got this specimen of mixed air and gas out of the stateroom.

A. That is something I don't know; I don't know just what mechanism he used to draw the air out.

Q. Do you know whether he placed that sample in a vacuum container of some sort?

A. He placed it in the bottle and sealed it. Now just whether it was a vacuum I do not know.

Q. Then you cannot say that the chemist did not have air in the bottle he placed it in which air would adulterate the sample which the chemist had taken from the stateroom, could you?

A. I can answer that by saying this: that the chemist had been instructed what he was to do. He was instructed to get a sample out of that room so that it would show the exact degree of concentration of carbon monoxide in that room after the two hour and twenty minutes' test. I left the means of doing that to him.

Q. Being present and observing you saw no  
684 evidence of a vacuum container in which the sample of gas drawn from the stateroom was?

A. I saw the bottle only.

Q. As far as you know to the contrary there might have been air in the bottle which would dilute the specimen that was taken out of the stateroom?

A. Yes. In view of the fact that the chemist was there for the purpose of getting an exact degree of concentration, I looked to him to see that there would be no outside influence or other air in the bottle that would interfere with a proper test.

Q. So you are not in a position to tell or say that the means adopted by the chemist were efficacious to procure the result which you were trying to determine?

A. No; that would be something for the chemist to answer.

Q. Now, did you observe the bathroom floor, that is, the floor of the bathroom which opened into this double aft-cabin?

A. Probably, but it didn't make any particular impression on me.

Q. But you did state that the bathroom door was closed at the time the test was made?

A. That is correct.



Q. Did you verify the figures that were given by Captain Roberts to you for the purpose of showing the cubical content of this after cabin?

A. No, sir.

Q. Were the figures that Captain Roberts gave you transmitted to the chemist?

685 A. In inspecting my file I find that on August 27, I telegraphed Captain Roberts and asked him to wire me the dimensions of the after-stateroom, so that we could obtain the cubical contents of the same. On the same day he answered by telegram, in which he said that the dimensions of the after-stateroom were 15 feet in width, length 9 feet and depth 6 feet four inches. Those are the figures that I transmitted to our chemist in Tampa.

Q. I will ask you to look at the floor plan of the Friendship II which is in evidence as Petitioner's Exhibit No. 3, for the purpose of refreshing your memory and to state whether the after-cabin is rectangular or cubical in shape as distinguished from—

A. Well, of course the sketch speaks for itself. It is rectangular except for the fact that it curves in toward the stern; in other words, it is not a regular rectangle.

Q. So the figures that the Captain gave you you now admit are incorrect insofar as he stated the cabin was 15 feet across?

A. Well, I think my statement will speak for itself. In other words, I have given you the dimensions, and they were figured by multiplying the three dimensions together. Of course, one end of the stateroom is not as wide as the other end, but the figures that were given covered the width at the widest part of the stateroom.

Q. So if you figured the cubical contents on the dimension of 15 feet, that of course would really result in an answer that would not give the cubical contents that the after-cabin actually had?

686

A. Probably so.

Q: Now the figures which were submitted to you and which you submitted to the chemist, Mr. Coleman, showed the cabin be  $6\frac{1}{2}$  feet high from the floor to the ceiling?

A. Six feet and four inches.

Q. They also showed the cabin to be 9 feet deep, did they not?

A. That is correct.

Q. Now point out on the plan here, if you can, where the 9 feet dimension ran from and to.

A. I don't know.

Q. Isn't it a fact that the so-called 9 feet was measured from the door leading into this after-cabin to the back wall of the cabin?

A. I don't know that either.

Q. Is it true then that if it was so measured that it is incorrect as showing the dimension of the after-cabin, because on each side of the cabin is a closet that takes up some of the width?

A. Well, the dimensions would include those closets.

Q. Now in making these tests and giving the chemist the figures did you eliminate the two closets about which you testified you closed the doors?

A. Judging from the fact that I gave him these figures, then I assume the closets were not eliminated.

Q. Did you eliminate from the cubical contents  
687 as transmitted to the chemist any amount of space because of the beds and the bunks which were in the stateroom?

A. No.

Q. Did you eliminate any cubical space because of the presence of the dresser which was in the stateroom?

A. No.

Q. Now these bunks and beds and the dresser were in the stateroom at the time of this test you mentioned was made?

A. The beds were. My mind is not clear about the dresser, but I suppose it was there.

Q. Wasn't there a dresser between the two beds against the wall?

A. I have a hazy recollection of it; I wasn't looking particularly for it; it might have been there.

Q. You knew or had been informed at the time the test was made, had you not, that these ladies had been found on the beds in this unconscious condition?

A. Yes, sir.

Q. And yet you did not undertake to draw a sample of the air from the approximate place in the stateroom where their heads would have rested while in bed?

A. Well, as I said, my best recollection is that the head of the hose was on the floor close to the place where one of the ladies would have been lying?

Q. On the floor?

A. On the floor.

Q. Did you have any information that they  
688 were laying on the floor?

A. No.

Q. In other words, the pipe was two and one-half feet below where her head would have actually rested while she was in bed?

A. Whatever that distance was.

Q. Did you have any information as to whether carbon monoxide gas was heavier or lighter than air?

A. No; I didn't even inquire; I didn't even think about it. That was a matter for the chemist.

Q. But you were directing the test?

A. I couldn't say right now whether it is heavier or lighter.

Q. But if you were making this test again you would find out?

A. If I were anticipating a cross examination like this I would.

Mr. Mershon:

That is all.

## Re-Direct Examination.

By Mr. Parmer:

Q. Mr. Coleman, when the chemist took the gas directly from the pipe by means of a hose, into what sort of a contraption did he run the gas that came from the hose?

A. Are you speaking of the test made with the hose?

Q. Yes.

A. As near as I can remember he had a five-gallon glass bottle, and this bottle was full of water and he ran the pipe into the bottle. This bottle was full of water, and he ran the pipe into the bottle, the first  
689 purpose of it was to let the gas coming out of the pipe displace the water.

Q. Now when he pumped the gas, that is, when he pumped the atmosphere out of the room on the other test, do you remember whether he used the same method of pumping the gas into the bottle, starting out with water in it?

A. No, I don't think so. I think he had some other kind of equipment; I think he had something there that sucked that air up into the bottle; just what the system was I don't know; whether it went through the bottle of water first or not I don't know. I didn't have very much to do with it; I wasn't watching his preparations. I figured that he was the one in charge of the experiment there; he was there to accomplish what I told him to accomplish, that is, to get the degree of concentration of gas in that after-stateroom. How he did it was immaterial to me.

Q. Have you any idea of how far away the end of this hose, which was inside of the stateroom, was away from the place where the lady's head might have been?

A. Very close to it.

Q. What do you mean by that?

A. I mean by that that it was right up against the bed.

## Ré-Cross Examination.

By Mr. Mershon:

Q. But the end of the hose in the stateroom was laying on the floor below the surface of the boat where the lady's head would hit?

690 A. That is my best recollection at this time.

Mr. Mershon:

That is all.

(Witness excused.)

691 Thereupon CAPTAIN FREDERICK ROBERTS previously called as a witness in behalf of the petitioner, resumed the stand and testified further as follows:

## Direct Examination.

By Mr. Parmer:

Q. Captain, I have here two charts, one being numbered 847 and the other 848. Can you point out to us on these charts the location where you were just before you started back to Miami on the morning of March 2nd?

A. Yes.

Q. I wish you would step forward and do it.

A. You mean Monday morning?

Q. Yes. I wish you would also arrange these charts so we can understand them.

The Court:

Give him a pencil and let him put marks to indicate where he was. Put a mark wherever you describe a certain point.



(By Mr. Parmer):

Q. Indicate it with the letter "A".

A. (Witness indicates.)

Q. The letter "A" indicates the place where you were anchored for the night from which you started in the morning, is that right?

A. Yes.

Q. And that is known as Featherbed Shoals?

A. Featherbed Shoals.

Q. I notice that this is called "Featherbed Bank" in that region.

692 A. Yes, Featherbed Bank.

Q. Featherbed Bank?

A. Yes.

Q. Now will you point out the route you took on the way back to the docks in Miami?

A. Here it is right here. I will mark that out now.

The Court:

Run your pencil over the line.

A. (Witness indicates on map.)

Q. Now will you please point out and mark the place at which you were when you first received information that the ladies were in trouble below in their bunks?

A. This (indicating) is just as close as I can give it; I remember this beacon here (indicating).

Q. You are pointing to a beacon?

A. Yes.

Q. Put a "B" where the beacon is.

A. (Witness indicates on diagram.)

Q. Now put the letter "C" where you think you were.

A. (Witness indicates on map.)

Q. Now what is your best recollection of how long you were occupied in going from the place marked "A" to the place marked "C"?

A. It wouldn't take over an hour and fifteen minutes or an hour and twenty minutes to go from this place to here (indicating).

Q. Now, comparing the distance from "A" to "C" with the distance from "C" to the dock, which was the greater distance would you say?

A. This distance (indicating).

693 Q. That is, you mean the distance from "A" to "C"?

A. Yes.

Q. From "A" to "C"?

A. Yes.

Q. Have you any idea of how much more than half of the distance of the total distance it was?

A. It couldn't have been over a mile or a mile and a half.

Q. How long after you received word with regard to the girls being in their bunks was it before you went down there and got them out of the room?

A. Right straight.

Q. How many minutes would you say?

A. It took me about three minutes to get down below.

Q. How long did it take you to get them out of the room?

A. Five or ten minutes.

Q. After you got there?

A. Yes.

Mr. Parmer:

I think that is all.

The Court:

Where did you start from on Sunday afternoon to go to the point "A"; in other words, where were you anchored on Sunday?

The Witness:  
Here (indicating).

The Court:  
Put the letter "D" there.

The Witness:  
(Indicates on diagram.)

The Court:  
Now, trace a line showing how you went from "D" to "A".

694 The Witness:  
(The witness indicates on diagram.)

Mr. Parmer:  
That is all.

Cross Examination.

By Mr. Mershon:

Q. Captain, do you now say that from the time you discovered the young ladies and brought them out on the deck, that it was about one hour before you got into Royal Palm Dock with them?

A. Right around an hour.

Q. You think it was an even hour?

A. It would have to be a full hour.

Q. So the young ladies remained up there in the open fresh air unconscious for over an hour and continued in that condition until Dr. Spencer Howell had been called and arrived on the boat?

A. I didn't say that.

Q. I am asking you if that is true or untrue?

A. I couldn't answer that question.

Q. You can answer this question though: that the young lady, Mrs. Just, remained in the open air on the back deck, on the upper deck at the stern of the boat, and Miss Grunow remained in Mr. Yeiser's stateroom where you had placed her, with the windows all open, for at least one hour until you got into the Royal Palm Dock?

A. Yes, sir.

Q. During that time you didn't see them at all?  
695

A. I never went around them at all; no, sir.

Q. How long was it after you got into the dock, the Royal Palm Dock, until Dr. Spencer Howell came aboard?

A. Not over thirty minutes.

Q. Now, Captain, when was the entry made in this log showing that the Friendship II on the morning of March 2nd, 1936, arrived at the Royal Palm Dock at 9:10 in the morning?

A. The Chief would have to tell you that.

Q. You don't know whether it was made that day or later?

A. No, sir.

Q. You don't know when it was made?

A. No.

Q. You made no effort to check up the entries to see that they were properly made?

A. No, sir.

Q. If Dr. Spencer Howell's records should show that he went aboard at 8:00 o'clock, would he be mistaken or not?

A. I don't know nothing about that.

Q. You don't know when he came aboard?

A. I don't know the exact time.

Q. You cannot say whether it was 8:00 or 9:40, can you?

A. No, but I know he was there 30 minutes after he was called, and he was called just as quick as we could send for him.

Mr. Mershon:  
That is all.

696

Re-Direct Examination.

By Mr. Parmer:

Q. Weren't you endeavoring to make some appointment here in Miami for Mr. McKay?

A. Yes.

Q. What time was that appointment?

A. At 10:00 o'clock.

The Court:

Were you still navigating when the ladies were brought up from below to the upper deck?

The Witness:

Yes.

The Court:

Who was at the wheel?

The Witness:

I was at the wheel.

The Court:

I thought you actually went down and took them up.

The Witness:

Yes, I did; the waiter came up and called me, and I turned the wheel over to a sailor; he probably had the wheel twenty minutes or thirty minutes.

Mr. Parmer:

I neglected to have these charts marked in evidence.

The Court:

Let them be filed in evidence.



(Thereupon, the charts above referred to were marked Petitioner's Exhibits 4-A and 4-B, respectively.)

(Witness excused.)

697 Thereupon J. N. PATTEN was called as a witness in behalf of the petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. What is your full name?

A. J. N. Patten.

Q. What is your business?

A. Marine surveyor.

Q. Are you with the vessel known as the Friendship II?

A. Yes.

Q. Were you on board the Friendship II prior to the time Mr. Yeiser bought it?

A. Yes.

Q. Were you on board the Friendship II after the time Mr. Yeiser bought it?

A. Yes, sir.

Q. Now did you go on board that vessel recently?

A. Yesterday.

Q. Where was she?

A. Over at Hibiscus Island.

Q. At that time did you make measurements of the after-stateroom?

A. Yes, sir.

Q. Did you ascertain what the cubic footage of that room was?

698 A. Yes, sir.

Q. Now, was that room in the same condition as far as appointments were concerned as when Mr. Yeiser had it?

A. As near as I could tell the furniture was all there.

Q. Were the closets the same as they had been on former occasions?

A. Yes, they were the same.

Q. Now will you tell us what you found the measurements of that after-stateroom to be?

Mr. Mershon:

We object to the question as an attempt by the petitioner to impeach the testimony of his own witnesses who have previously testified.

Mr. Parmer:

Not at all.

The Court:

The objection is overruled.

Mr. Mershon:

It may be that our objection is premature.

Q. Go ahead and answer the question.

A. Do you want me to explain what measurements you took, what the measurements were, what deductions you made, if any; and how they were made.

A. The shape of that after-cabin naturally is narrower at its ends, and in order to take the mean width—

Mr. Mershon:

We object to that and move to strike out "to take the mean width."

The Court:

We are interested in the result as compared with the result given by Mr. Walker. I will overrule the objection.

699 (By Mr. Parmer):

Q. Tell us first what result you arrived at after making the various deductions.

A. The gross cubic feet was 810.78, plus the offset of four windows, which amounted to 4.2 cubic feet. The total gross was 814.98. The deductions amounted to 23.9 cubic feet, giving a net of 790.09 cubic feet. Do you want me to read the deductions and what they are?

Q. Yes.

A. I will just read them off.

Carlines 2" x 2.75" x 12'-10" .....	58.28 cubic inches
Shelf area: 60" x 5" x 7/8" .....	262. cubic inches
Two partitions 60" x 48" x 7/8" .....	2520. cubic inches
Sides of berths 6 1/2' x 3 1/2' x 7/8" ....	5945. cubic inches
Side moulding 8'10" x 10" x 1/2" .....	1060. cubic inches
Closet partitions and doors, 49" x 6'-x8"	
x 2" x 6'-8" x 3/4" .....	2640. cubic inches
One dressing table—17 1/2" x 36" x 42"	
plus 92 cubic inches .....	785. cubic inches
	1528.69 cubic inches
	26,650. cubic inches

700 That is a total of 41,448.97 cubic inches or 23.9 cubic feet. That is all of the deductions I made.

Q. Did you deduct from the gross cubic footage everything which interfered with the open space within that enclosure?

A. Yes.

Mr. Mayne:

That is a conclusion of the witness.

The Court:

It is subject to cross-examination. I do not think it is subject to a motion to strike, so I will overrule the objection.

Mr. Parmer:

That is all.

### Cross Examination.

By Mr. Mershon:

Q. Mr. Patten, the figures you have just given were read by you directly from a piece of paper that you have in your hand?

A. Yes, sir.

Q. Without looking at that paper do you have any independent recollection either of the figures or the deductions which you made or what you did?

A. Some.

Q. Without looking at the paper—

A. The deductions are 23.9 cubic feet.

Q. Do you have any independent recollection of the matters shown on that paper and the matters which you read into the record here, if you do not look at that paper?

A. I have a copy of that.

Q. Do you have any independent recollection of the matters shown on that paper and the matters  
701 which you just read into the record?

A. I said I had a copy.

Q. Are you depending either on this paper or the copy to know exactly what you did?

A. No, sir; I know what I did.

Q. Please repeat exactly what you did and give the—

A. I can't remember all of these cubic inches.

Q. Can you remember all of the deductions that you made?

A. I can itemize them, yes.

Q. Without this paper?

A. Yes. I deducted and measured the columns, the two fore and aft columns, the mouldings, all of the side shelves, the boxes, the closet door—

Q. Do you have any recollection of the measurements covering these deductions without looking at this paper?

A. No, I wouldn't want to answer that correctly, however, this paper is correct.

Mr. Mershon:

Your Honor, we will not move to strike the testimony, but I will ask that counsel let the paper go in just as it is.

Mr. Parmer:

I will be delighted.

The Court:

Let it be marked in evidence.

(Thereupon the document above referred to was marked Petitioner's Exhibit No. 5.)

(By Mr. Mershon):

Q. Captain, did you make any deductions from the cubical content of that after-cabin by reason of  
702 any baggage or luggage?

A. No, I did not. They didn't have any baggage in there excepting a pair of shoes or maybe a shirt hanging in the closet. There was very little in that stateroom.

Q. In deducting for this dresser and table which you say was  $17\frac{1}{2}$  by 36 by 42 inches, did you or did you not deduct the full cubical contents of that dresser?

A. No, sir.



Q. You made no deduction for the interior of the dresser?

A. No, sir.

Q. You made no deduction for the inside of the drawers.

A. No.

Q. You assumed that the dresser was empty and had no clothes or any other solid objects in it?

A. Yes, I assumed that.

Q. Is that right?

A. Yes. They are living aboard that yacht now, but there was very little in that stateroom.

Q. You say someone is living aboard the Friendship II now?

A. Yes, the new owner.

Q. What is his name?

A. Mueller, I believe.

Q. Did he give you permission to go aboard for the purpose of making your measurements?

A. Yes.

Q. When did you go there?

A. Yesterday afternoon.

703 Q. Where is she moored now?

A. At Hibiscus Island.

Q. Did you make any deductions for the presence of the bodies, the physical corporeal bodies or anatomies of persons in that stateroom?

A. No, the lady left from the stateroom before I went in.

Q. You did not measure that lady?

A. No, but I was willing to, though.

Q. If there had been two ladies, one medium sized and one rather large, in there at the time it would have reduced your cubical contents?

A. Except for the lung cavities of both of them.

Q. Did you make any deduction for the presence of any clothing in the closets, the two closets connecting into the stateroom?

A. No; there were one or two dresses in there, but they would not naturally displace any appreciable amount of atmosphere.

Q. What is the color of the bed in there?

A. It had a sort of blue slip on it.

Q. I mean the so-called built-in bunks.

A. That is mahogany.

Q. As a matter of fact, are there not single beds installed there?

A. Yes, they are built-in, single berths.

Q. Does this photograph, identified as Claimant's Exhibit No. 1 appear to be a fair representation of 704 that stateroom as you saw it?

A. That is correct, that is looking at the port side forward.

Q. And does Claimant's Exhibit No. 8, which is another picture, appear to be—

A. This is on the other side, that is the starboard side.

Q. That is the starboard side of the same cabin?

A. Yes.

Q. You say you were familiar with the Friendship II and had been aboard her on previous occasions?

A. Yes, sir.

Q. When was the first time that you went aboard her, if you recall?

A. Can I look at my records?

Q. Yes.

A. I made a survey of her in 1933; that was when Dr. Adams owned it.

Q. You made a survey of her for Dr. Adams?

A. Yes.

Q. And you went aboard her at that time?

A. Yes, just to make a condition survey.

Q. To survey her condition?

A. Yes, for insurance purposes.

Q. What did you at that time find her condition to be?

Mr. Parmer:

I do not think that has any relevancy to the measurements of the room made yesterday. I intend to  
705 come later to the other points.

The Court:

The cross-examination should be limited to the prior examination.

Mr. Mershon:

If your Honor please, I submit that it is proper cross-examination, both to develop the interest of the witness as affecting his possible credibility and also to ascertain the witness' knowledge and familiarity with the boat which he has testified he had been previously aboard. We have a right to go into the question of the witness' knowledge of the condition of that boat, when he says he knew her condition.

The Court:

It is not necessary to argue it. The cross-examination will be limited to the prior examination so far as affecting the after-stateroom.

Mr. Mershon:

Do I understand, Mr. Parmer, that you will recall this witness?

Mr. Parmer:

Yes.

Mr. Mershon:

Then we will not ask the Court to place the witness under subpoena from the bench, Mr. Parmer, in view of the fact that you say you will recall him.

The Court:

Any further cross-examination.

Mr. Mershon:

Not at this time.

The Court:

Any further re-direct examination?

Mr. Parmer:

I think that is all.

706

Thereupon: VERTA NORD OLLIS was called as a witness in behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. Please state your name.

A. Verta Nord Ollis.

Q. Where do you live?

A. 629 S. W. 10th Avenue.

Q. That is in Miami?

A. Yes.

Q. What is your business or profession?

A. Registered nurse.

Q. How long have you been a registered nurse?

A. Four years. *en*

Q. Now did you ever act as a nurse on the yacht Friendship II?

A. I did.

Q. At about what period, if you recall?

A. Well, I can't remember exactly, but it was for about one month.

Q. Well, who were you taking care of at that time?

A. Mr. Henry Yeiser.

Q. Were you acting as nurse at the time of his death?

A. I was.

Q. And the month during which you were his nurse preceded his death, did it not?

707 A. Yes.

Q. And during the time that you were acting as nurse for Mr. Yeiser where was the vessel?

A. It was docked at the Royal Palm Dock.

Q. Were you nursing him during the entire period that the vessel was docked there?

A. Yes.

Q. And from whom did you obtain your orders with regard to what you should do in connection with nursing Mr. Yeiser?

A. Dr. Spencer Howell.

Q. Was there another nurse on the case as well as yourself?

A. Yes.

Q. And what was her name?

A. Miss Ann Norwood.

Q. Is she living now?

A. No.

Q. Now exactly what did you do for Mr. Yeiser during the time you were acting as his nurse?

A. I carried out the doctor's orders; I ordered his meals, told him what time he should retire and what time he should get up and gave him medications and so much gin.

Q. So much gin?

A. Yes.

Q. Did the consumption of gin increase or decrease with the progress of the treatment?

A. Decreased.



708 Q. Now do you remember the occasion when Mr. Yeiser, in company with Mr. McKay and two ladies went on a trip around the beginning of March or the end of February?

A. I do.

Q. Had you been on the boat just prior to that trip?

A. Yes.

Q. On any of the days prior to the beginning of that trip had you seen Mr. McKay on board?

A. Yes.

Q. Well now can you tell us which day it was that you saw Mr. McKay before the trip commenced?

A. Two days before.

Q. That would be Wednesday, if the ship left on Friday?

A. Yes.

Q. Can you tell us what time of the day it was that you saw Mr. McKay on board the vessel?

A. I should say it was around 7:30 or 8:00 o'clock in the evening.

Q. Where on the boat did you see him at that time?

A. He was in Mr. Yeiser's cabin and in the waiting room part of the time.

Q. Was Mr. Yeiser there too?

A. Yes.

Q. Were you there?

A. Yes.

Q. Did you hear any conversation at that time between Mr. Yeiser and Mr. McKay?

709 A. I heard the conversation; they were making plans for a trip, and as far as repeating the conversation, I didn't pay any attention to it at the time.

Q. Did you gather the purport of it?

A. Yes, they were making plans as to what time they would sail, where they were going and what they would take along, but I cannot repeat any of the conversation.

Q. Did you receive an offer to go on the trip?

A. No.

Q. You didn't go on that trip, did you?

A. No.

Q. Were you actually on the vessel the day that the ship pulled out?

A. Yes.

Q. Until what time?

A. Until about 8:00 o'clock in the morning.

Q. And what was Mr. Yeiser's general condition on that day with respect to what it had been when you came on the case?

A. Improved.

Q. Had he become more active?

A. Yes.

Q. To what extent?

A. He didn't drink as much; he was able to move around without assistance of us, without assistance of his valet or any one helping him; his appetite was better and he wasn't as nervous.

Q. Had he been ashore?

A. I can't remember, but I think one time;  
710 yes, once.

Q. Well, now on the day the boat sailed, which was on Friday, did you see any packages come on board the ship?

A. In the afternoon before.

Q. You mean on Thursday?

A. Yes.

Q. Do you know where the packages were put?

A. Yes.

Q. Whereabouts were they put?

A. In the pantry room on the lower deck.

Q. Did you see those packages after they had been brought on board the ship?

A. Yes.

Q. How long after they had been brought on board the ship did you see them?

A. Five or ten minutes.

Q. What was the occasion for your seeing the packages?

A. I went down to pour Mr. Yeiser a drink; that is where we kept his "drinks".

Q. You mean that is where you kept his liquor?

A. Yes, his gin.

Q. And what did you see when you got to where the packages were?

A. The package had been torn open, and two bottles of gin taken out of the package.

Q. Did you see them taken out of the package?

A. No. Well, I should have said there was a package there containing something.

711 Q. You didn't see what was inside the package?

A. No.

Q. Did you see the two bottles of gin?

A. Yes.

Q. How close were they to the package?

A. Right beside it.

Q. What did you do with the two bottles of gin?

A. I opened one of them and poured a half an ounce out.

Q. What did you do with the bottles?

A. Left them where they were.

Q. Did you get gin from either one of these bottles later on?

A. Yes, sir.

Q. Well, I take it that you were not there when the vessel pulled out?

A. No.

Q. Did you on the following Monday return to the vessel?

A. Yes.

Q. About what time of the day?

A. Around six o'clock in the afternoon.

- Q. Was the other nurse there when you arrived?  
 A. Yes.  
 Q. Did she stay or did she leave?  
 A. She gave me the report and left.  
 Q. Now from the time that you came on the vessel on Monday and thereafter did you see Miss Grunow?  
 A. Yes, I did.  
 Q. Whereabouts did you see her?  
 712 A. In Mr. Yeiser's cabin.  
 Q. Where was she in the cabin?  
 A. On the bed.  
 Q. Did you see Mr. Yeiser?  
 A. Yes.  
 Q. Where was he?  
 A. He was also on the bed.  
 Q. Also on the bed?  
 A. Yes.  
 Q. Did you serve them anything?  
 A. Yes.  
 Q. What did you serve them?  
 A. Gin.  
 Q. How many times?  
 A. Three or four; I couldn't tell you for sure.  
 Q. Between what hours did you serve them three or four times gin?  
 A. Between six and ten.  
 Q. Did you have any conversations with Miss Grunow?  
 A. Yes.  
 Q. Will you tell us what those conversations were?  
 A. I told her she must dress and leave the boat, that I had orders from Dr. Howell that she was to leave.  
 Q. When did you tell her that?  
 A. Around 8:30 or 9:00 o'clock; I imagine it was right after Dr. Howell made his call.  
 Q. And what did Miss Grunow say to you?  
 A. She told me to watch and if I saw anyone coming on board to tell them that she was sick and didn't want to leave the boat.  
 713

Q. Did you have any other conversations with her about leaving the boat?

A. Well, she told me several times that she didn't want to leave and I told her I had nothing to do with that, and that I was only Mr. Yeiser's nurse.

Q. Did Mr. Yeiser say anything in her presence while she was there with regard to whether or not she should leave the boat?

A. He told me to let her stay if she wanted to.

Q. Did you do anything after Mr. Yeiser said that with regard to letting her stay?

A. When Mr. McKay came on the boat I went and took her clothes and told her to come and get her clothes on. She raised up and dressed herself, and I helped put her shoes on, and Mr. McKay took her off.

Q. Now during the time that you were on the vessel did you notice any inability on her part to carry on a conversation?

Mr. Mershon:

We object to the question as leading.

Mr. Parmer:

I will withdraw it.

(By Mr. Parmer):

Q. During the time you were on the boat will you tell us how she talked?

A. She impressed me as being intoxicated.

Mr. Mershon:

We object to the answer and move to strike it on the ground that it is a mere conclusion of the witness

714 and is not responsive to the question.

Mr. Parmer:

I will consent.



The Court:

The objection is sustained and the motion to strike is granted.

(By Mr. Parmer):

Q. Will you describe how she talked and we will form our own conclusions as to what condition she was in. Just tell us how she talked.

A. I don't think I could tell you how a drunk talked very well.

Q. Did she talk as an ordinary person talked?

A. No, sir; she talked as an ordinary drunk person would talk.

Q. Did she talk like a person who was not intoxicated?

A. No.

Mr. Mershon:

We move to strike that answer, if your Honor please, as being subject to the same objection as the other one, that is, it is a mere conclusion of the witness. She has not testified to any facts or circumstances from which that conclusion may be drawn.

The Court:

The motion is denied.

Mr. Mershon:

I also object on the grounds that it is irrelevant and immaterial; the time is too remote. The testimony relates to a time long after the time of the transaction or incident upon which the Claimants' claim is based, and there is the additional objection on the part of Mrs. Just that it is not relevant or material, that is, with respect to Mrs. Just's claim, because she was in the hospital unconscious at that time.

715 / The Court:

Certainly this testimony would be restricted to Miss Gruner. The objection is overruled.

(By Mr. Parmer):

Q. You stated that you had her dress and that she dressed herself. Now, while she was in the room what clothing did she have on from six until the time she started to leave?

A. A gown.

Q. You mean a night gown?

A. Yes, sir.

Mr. Parmer:

That is all.

#### Cross Examination.

By Mr. Mershon:

Q. When you first went aboard the yacht Friendship II to nurse Mr. Yeiser, did you go as what they call the night nurse?

A. Yes, sir.

Q. You performed twelve-hour duty?

A. Yes.

Q. What time would you go on duty and what time would you get off?

A. I would go on six or seven in the afternoon and leave about eight o'clock in the morning.

Q. Who first called you on that case?

A. Dr. Spencer Howell.

Q. You did not go on that case until after Dr. Howell had commenced treating Mr. Yeiser?

A. No.

Q. How long did you say you were nursing Mr. Yeiser before his death?

716 A. I can't remember exactly.

Q. Didn't you say it was about a month?

A. About three weeks or a month.

Q. Which is it?

A. Between three weeks and a month; I can't make sure.

Q. There was nothing about the case that would impress on you either the time you went to work on that case or the day when Mr. Yeiser died?

A. No.

Q. How did Mr. Yeiser spend his time, or, rather, where did he spend his time aboard the boat from the time you first started nursing him until they began the trip in February 28, 1936—how would he occupy his time?

A. Reading.

Q. Was he in bed all the time?

A. No.

Q. What was his mode of living on the boat; how did he occupy himself?

A. He listened to the radio and he read on the upper deck in the waiting room.

Q. Would he ever go up to the forepart of the boat?

A. I never saw him up there. Do you mean in the Captain's quarters?

Q. Yes, in the Captain's quarters.

A. I have seen him walk outside, but I don't remember seeing him go in the Captain's quarters.

717 Q. You have seen him walk around the deck of the boat?

A. Yes.

Q. And of course in the evening he would retire; what time would he retire and go to bed?

A. Twelve o'clock.

Q. Would he have company aboard the boat?

A. Very seldom.

Q. But he did have company aboard the boat?

A. Yes.

Q. Well, when you were nursing Mr. Yeiser before this trip how would he dress aboard the boat?

A. A polo shirt and dress pants.

Q. Did he always wear his shirt and trousers?

A. Yes, sir.

Q. Do you mean that he did not go around the boat in his pajamas with a dressing-gown or something over them?

A. Not unless he was in the bed retired for the night, then he had on his pajamas; he didn't go outside of his cabin with his dressing-gown on that I remember.

Q. Did he get up in the morning before he left the boat?

A. No.

Q. You never saw him get up and start the day off?

A. No.

Q. So you don't know of your own knowledge that he had on his pants and polo shirt during the day?

A. Only from what the other nurse said.

718 Q. So you are telling something that the other nurse told you, something that you do not know of your own knowledge?

A. I know that I would see him there; when I got there in the evenings I asked the other nurse, and I would take the other nurse's word for it, which I had a right to do.

Q. So these other things you have testified to are based on what someone else told you?

A. No.

Q. You said that when he got up in the morning he immediately put on his shirt and trousers; is that what someone else told you?

Mr. Parmer:

I object to the question; the witness did not say that was the only time she saw him.

The Court: .

The objection is overruled. Answer the question. This is an intelligent witness and she can take care of herself all right. Read the question to her:

(Thereupon the preceding question was read by the Reporter as above recorded.)

A. Did you ask me that question?

Q. Yes.

A. I don't say he did that; I didn't tell you at first that he did that.

Q. Well, I am asking you now.

A. Well, I never saw him myself outside his cabin until after six o'clock in the evening.

Q. You never saw Mr. Yeiser outside of his cabin until after six in the evening, is that right?

719 A. That is right.

Q. You say that he went to bed about twelve o'clock and he was always in bed when you left the following morning?

A. That is right.

Q. Now, I will ask you whether to your knowledge Mr. Yeiser customarily in the morning and in the daytime went about his boat or stayed in his cabin dressed only in his pajamas with a dressing-gown or some similar article of wearing apparel over them. Do you know whether he did or not?

A. I don't know.

Q. Do you know of your own knowledge when during the day Mr. Yeiser was accustomed to put on his trousers and his shirt, of your own knowledge?

A. Not being there I wouldn't know; I only have the other nurse's word for it.

Q. Who have you talked to about this case and about your testifying here, if to anyone?

A. Do I have to answer that?



Mr. Parmer:

Yes.

A. I talked to the crew.

Q. What members of the crew?

A. I talked to the Chief and one of the sailors, but not very much.

Q. When did you talk to them?

A. When we heard this case was coming up, we just said—just merely mentioned it; we didn't talk much about it.

720 Q. How long ago was it that you talked about it?

A. Three or four days ago.

Q. And you had not discussed this case with anybody until three or four days ago since Mr. Yeiser's death?

A. No, not until the case came up again.

Q. And that was three or four days ago?

A. No, that was when the case started; it was about one week ago when the case opened.

Q. How many times have you discussed with the members of the crew anything about this case?

A. Once with one of the sailors and once with the engineer.

Q. You never discussed it with Captain Roberts?

A. No.

Q. Are these two occasions the only times you have discussed this case with anyone?

A. Yes..

Q. Is that right?

A. Yes.

Q. Have you not talked to any lawyers about it?

A. I only talked to Mr. Parmer when he told me he wanted me to come down as a witness.

Q. You didn't think to mention that awhile ago?

A. I didn't know that you meant the lawyers. You said the crew; you said the crew, didn't you?

Q. Madam, I asked you if you talked to anyone. I don't want to argue with you. Did you talk to anybody in this wide world, man, woman or child, white or black, lawyer, crew or otherwise; I want to know who else have you discussed this case with prior to this hearing except Mr. Parmer, Mr. Blount and the members of the crew.

A. That is all.

Q. What was the name of the other member of the crew?

A. Chief Blount and Chubby Mickle.

Q. When was the first discussion you had of this case and your testifying in it after the death of Mr. Yeiser; when was the first time you discussed with anybody about testifying in this case?

A. A year ago I talked to Mr. Coleman.

Q. Now are you changing your testimony again and saying that you talked to Mr. Coleman in addition to Mr. Parmer, Mr. Blount and Chubby Mickle; do you mean to say that you have talked to Mr. Coleman?

A. You said since this case come up, did you not?

Mr. Mershon:

Mr. Reporter, with the Court's permission will you turn back and read the last three questions and answers?

(Thereupon the preceding three questions and answers thereto were read by the Reporter as above recorded.)

(By Mr. Mershon):

Q. Did you talk to anyone else whatsoever at any time concerning your testifying in this case except Mr. Coleman, Mr. Parmer, Mr. Blount and Mr. Mickle?

A. No.

Q. You have not discussed it with Captain Roberts?

A. No.

722 Q. Have you discussed this case with Dr. Howell, Dr. Spencer Howell?

A. No. He told me he testified, but we didn't discuss the case; I just saw him and he told me that he had testified and he thought they would probably use me as a witness. We didn't discuss anything that he said or anything about the case.

Q. Did he ask you if you remembered certain things?

A. No.

Q. Are you quite sure of that?

A. Yes.

Q. Who else was present when you talked to Dr. Howell about the case, that is, about whatever you discussed with him?

A. No one.

Q. When you talked to Mr. Coleman about the case, meaning Mr. Bert Coleman here of the firm of Loftin, Stokes & Calkins, attorneys for the Petitioner, the administrator of the Yeiser estate,—when was that?

A. It was one year ago this past August.

Q. And you have not discussed the case with him since that time?

A. No.

Q. Did you give Mr. Coleman a written statement at that time, a written statement signed by you?

A. No, not that I remember; I was in the hospital and I was ill.

Q. Did you ever give Mr. Coleman or anyone else a statement which was signed in writing by you at that time or at any other time; have you ever given a written statement signed by you setting forth what you knew about this case?

723

A. No, I have not.

Q. Did you ask Mr. Yeiser what to do about Miss Grunow leaving the boat?

A. No.

Q. What occasioned him telling you then to let her stay on board if she wanted to?

A. He heard Miss Grunow tell me that she wanted to stay.

Q. Where was Miss Grunow at that time?

A. She was propped up on the bed.

Q. What do you mean by "propped" up?

A. With pillows.

Q. Where was Mr. Yeiser?

A. He was also in the bed.

Q. Was he on the inside of the bed or the outside?

A. The outside.

Q. Was he also propped up?

A. Yes.

Q. Did he hear Miss Grunow tell you, as you say, that she would pretend that she was sick if anyone came?

A. No.

Q. Can you account for Mr. Yeiser's not having heard the statement, that statement, if he heard the rest of what Miss Grunow said in your presence and in his presence?

A. He was in the bathroom.

Q. How long did he remain there?

A. Approximately five minutes, I should say.

724 Q. How long did it take Miss Grunow to tell you that she wanted to stay on the boat and if anyone came she was going to pretend to be sick?

A. Not very long.

Q. Did she tell you first that she wanted to stay on the boat; did she make a separate statement first or did she make it all at the same time?

A. I told her that Dr. Howell had told me to get her off the boat. He said that if she stayed there and wanted drinks it would make Mr. Yeiser want more to drink. It was then she said, "I want to stay on the boat." I said, "I cannot let you," and she said, "Oh, please, let me stay; you wait and if you see someone coming on board the

boat, come back and tell me so I can pretend I am sick. I don't want to leave the boat."

Q. Mr. Yeiser heard her say that she didn't want to leave the boat, but he didn't hear the part of the statement that if anybody came on the boat that she would pretend to be sick, is that right?

A. That is right.

Q. How much of these two bottles of gin which you found in the pantry on Thursday afternoon did you use or dispense before you left the next morning.

A. Well, I gave Mr. Yeiser approximately half an ounce either two or three times before he retired for the night on Thursday. I didn't give him any before  
725 I left Friday morning.

Q. Now, did you see the gin before you left Friday morning and know that there was a full bottle which hadn't been touched and another bottle that had just two or three ounces gone out of it?

A. Yes.

Q. And you know that Friday morning when you left there was one full bottle and part of another?

A. Yes.

Q. And that was six o'clock Friday morning?

A. Eight o'clock Friday morning.

Q. Eight o'clock?

A. Yes.

Q. Mr. Yeiser did most of his drinking in the day-time, didn't he, when he was awake?

A. About the same; he was only allowed so much; he drank about as much at night as he did in the day-time.

Q. You mean at the same rate?

A. Yes.

Q. So he would actually consume more during his waking hours in the day-time than during the night, a part of which at least he was asleep?

A. Yes.



Q. How often did they get gin and bring it aboard for Mr. Yeiser while you were there?

A. I don't know.

Q. Wasn't it a customary thing to always find  
726 bottles of gin in the pantry?

A. Yes.

Q. They kept a supply in the pantry, didn't they?

A. Yes.

Q. And there was nothing unusual about your finding two quarts of gin in the pantry?

A. Not about finding two quarts, but there was something unusual about seeing the rest of the supply there.

Q. Have you testified as to any other supply of gin or liquor there?

A. Yes. I testified about a package being there in which these two bottles had been taken from.

Q. Did you see that package?

A. Yes.

Q. How much gin was in it?

A. I don't know.

Q. What size package was it?

A. About this long (indicating).

Q. Was it a paper package?

A. It had brown paper on the outside; I didn't notice whether it was in a pasteboard box or not.

Q. Was it in a box?

A. I don't know.

Q. Do you know what was in that package?

A. I saw where two bottles had come out of it; it looked like—

Q. Do you know what was in that package?

727 A. Yes.

Q. Do you know who ordered it?

A. No.

Q. Now in what quantities had it been the custom to bring gin and liquor aboard the boat for Mr. Yeiser's use?

A. I don't know.

Q. What was the most you had ever seen brought aboard at any time prior to the time you saw this on Thursday?

A. I never saw it brought aboard before.

Q. What was the most you had ever found in the pantry there prior to that time?

A. Not over two quarts.

Q. Would that be replaced two quarts at a time?

A. Not always.

Q. How often would they replace it in the pantry?

A. When I would have a bottle almost emptied.

Q. How long would it take you to empty a bottle?

A. I don't know.

Q. Do you know how much gin the day nurse supplied to Mr. Yeiser?

A. She had it on the record that he was to have half an ounce an hour.

Q. When you first started on the case how much gin was Mr. Yeiser drinking a day?

A. I don't know.

Q. Was it four quarts a day?

A. I don't know.

Q. Was it more than four ounces a day?

728 A. Yes.

Q. You have no idea how much more?

A. Quite a bit more.

Q. Would you say it wasn't four quarts?

A. Yes.

Q. Would you say it wasn't three quarts a day?

A. Yes.

Q. Would you say it wasn't two quarts a day?

A. No, I wouldn't say that.

Q. You think it was about two quarts a day?

A. I don't know.

Q. Now if Dr. Howell's records show and if Dr. Howell testified that he was only on that case ten days before this trip was taken, would you say that you were on that case more than ten days before this trip was taken?

A. I couldn't faithfully say how long I was on the case.

Q. Your recollection is not clear on that?

A. No.

Q. Had you ever seen Miss Grunow before that night?

A. No.

Q. Have you ever seen her since she walked off the boat that night?

A. No.

Q. Did you see Mr. McKay come aboard the Friendship II to get Miss Grunow and she went away with him?

A. Yes.

Q. Who escorted Miss Gruner from the boat  
729 to the shore?

A. Mr. Yeiser took her off the boat; Mr. McKay took her off the boat and I stayed with Mr. Yeiser. I don't know who helped her to get off the boat.

Q. You say that Mr. McKay escorted Miss Gruner from Mr. Yeiser's cabin off the boat?

A. Yes.

Q. Do you know what time that was?

A. Around ten o'clock.

Q. Could it have been earlier than that?

A. No.

Q. You are positive of that?

A. Yes.

Q. Did either Chief Blount or Captain Roberts escort Miss Gruner off the boat onto the dock?

A. I don't know; I only saw Mr. McKay take her outside the boat.

Q. Did you see Mr. McKay lead her down or escort her down to the gangplank and onto the dock?

A. No; I never saw him take her down the gangplank; I only saw him when he took her out of the door.

Q. Out of the door of the cabin?

A. Yes.

Q. So you did not see him escort her off the boat?

A. No, not down the gangplank.

Q. Where did you find Miss Gruner's clothes when you gave them to her and told her to dress herself?

A. In the cabin in the lower deck.

Q. The double cabin?

730 A. Yes.

Q. And it was after Mr. McKay came aboard that you went down there and got her clothes and brought them to her?

A. Yes.

Mr. Mershon:

That is all.

# Re-Direct Examination.

By Mr. Parmer:

Q. Did you in preparing drinks for Mr. Yeiser take the gin as it was in the bottle or did you put anything in it before you served it to him?

A. I made it about half gin and about half water.

Q. Was there any medicine that you put in the drinks before you served him?

A. No, I didn't mix his medicine with his drinks.

Mr. Parmer:

That is all.

The Court:

All right; we will adjourn until two o'clock.

731 Thereupon: DR. FRANK B. VOIS was called as a witness on behalf of the Petitioner, and hav-

ing been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. What is your full name?

A. Dr. Frank B. Voris.

Q. What is your address?

A. Office address 541 Lincoln Road.

Q. Is that your home address or business address?

A. Office.

Q. What is your home address?

A. 6655 Brevity Lane, LaGorce Island.

Q. How long have you been a practicing physician in Florida?

A. I came here in June of 1933 at the Jackson Memorial Hospital and took the examinations in December of 1933.

Q. Are you married?

A. Yes, sir.

Q. Now in March, 1936, were you in any way associated with the St. Francis Hospital?

A. Yes.

Q. In what capacity?

A. I was head Resident, doing their surgery for them.

Q. What does "head resident" mean?

A. There was another Resident under me; we did practically internship work, however, I was practicing at the time and had an office in town, and I was  
732 doing extra work for them and living at the hospital and more or less assisting in consultations and looking after patients that doctors asked me to

Q. Now were you there when Mrs. Just was brought to the hospital?

A. Yes, I was there.



Q. Did you take any part in her treatment?

A. No, sir.

Q. Who treated her there?

A. Dr. Howell was the doctor.

Q. Well at any time after that did you visit Mrs. Just?

A. I saw her for a minute or two with Dr. Howell, and I saw her when Dr. Harris came in for a few minutes, and then two or three days later I saw her for about five or six minutes, and then another time, a day or two later, I just looked in and she was sleeping and I didn't disturb her.

Q. On this occasion, which was two or three days after the day on which she came in, will you tell us where you saw her then?

A. You mean the room of what?

Q. Yes; was it in a room?

A. She was in room 214 of the hospital, and she was in bed at the time.

Q. Who was there at the time you saw her; who was there besides Mrs. Just and yourself?

A. Miss Dillard.

Q. Who was she?

A. She was a special nurse in the daytime.

733 Q. Well, when you first went into the room will you tell us whether she was sleeping or not?

A. She wasn't sleeping. As I recall her back was toward me when I walked in the door.

Q. After you got in a position where you could see her face did you observe whether she was sleeping?

A. She had her eyes closed, and she opened her eyes and sat half way up in bed and looked at me and said, "Come here, you handsome devil"; either devil or brute, something like that, and then she grabbed me by the arm and the necktie and tried to pull me down in bed with her; she swung her body out so that her legs were

over the edge of the bed and tried to pull me down on top of her.

Q. Did you do anything when she did that?

A. I pulled her hands and arms away and the nurse helped me to put her in bed, and she persisted in getting up and held to me.

Q. Did you talk to her with regard to her actions?

A. No. I told her to stop it and to lie down and be quiet.

Q. How long were you in the room during which this was going on?

A. I wasn't in there over two or three minutes; at the most four minutes.

Q. When you left did you leave with anybody?

A. Miss Dillard came outside of the door with me and she closed the door behind us.

Q. As you were leaving did Mrs. Just say anything to you?

A. She didn't want me to leave; she made  
734 some remark about me and said that she would like that I stay there.

Q. Did you notice any difficulty in the manner in which she talked?

A. No, sir.

Mr. Parmer:

That is all.

### Cross Examination.

By Mr. Mershon:

Q. Doctor, you say this was the second day that Mrs. Just was in the hospital?

A. I don't recall whether it was the second or the third day.

Q. Had anything of that sort ever happened to you before in hospitals where patients were abnormal and out of their heads and minds?

Mr. Parmer:

I object to the phraseology of the question—"out of their heads and out of their minds".

The Court:

It is cross examination. The motion will be denied.

A. One similar case about four or five years ago happened in a Chicago hospital, but it wasn't of that physical nature at all.

Q. Was it a case where a patient undertook to have personal contact with you?

A. Well, I don't know whether you could infer it as such. This other woman had come into the hospital and I was taking the history and she insisted that I come closer to the bed and sit on the bed or she would scream or jump out of the window.

Q. What did you do then?

735 A. I came closer to the bed and put on the bed-light that they have in hospitals, and the nurse fortunately came in at the time.

Q. The nurse wasn't present on that occasion in Chicago?

A. No.

Q. But in this case Miss Dillard was actually in the room?

A. At all times that I was there, yes.

Q. You knew that Mrs. Just was a patient, did you not?

A. Yes, sir.

Q. You had seen her come in or knew when she was brought into the hospital?

A. Yes.

Q. You had familiarized yourself at least in a general way to know from what ailments she was suffering?

A. I didn't take a history or do a physical examination but I was present and discussed the thing with Dr. Howell when he brought her in.

Q. Had you read over Dr. Howell's written diagnosis on the records of the hospital?

A. Well, I was there when he wrote it down.

Q. What was the occasion of you going in to visit Mrs. Just?

A. Dr. Howell, whenever he brings a patient in, as a general rule says to drop in and see them; and it is one of the duties of the House Physician or House Surgeon to more or less see how everyone is getting along, and you do make rounds and go to see different patients.

Q. What time of the day was this, if you recall?

A. I don't recall whether it was in the morning or in the afternoon but it was daylight.

Q. It was daylight?

A. Yes, sir.

Q. A thing of that sort never had happened to you before in your career except the one incident in Chicago. Do you mean to say that you can't now remember whether it was the first, second or third day that Mrs. Just was in that hospital?

A. No, sir, because as a general rule they run all the way from 40 to 150 patients, and thousands come in and out, so it is not clear to me what day it was.

Q. Were you aware, doctor, that Mrs. Just had come into the hospital on the afternoon of March 2, 1936?

A. I do not exactly know the dates, but I know that she was there.

Q. Can you, by referring to this hospital record, tell when Mrs. Just was admitted to the hospital?

A. March 2, 1936. That is the form they use at the St. Francis. Here is another way of telling it, too: "March 3rd—Urinalysis"—

Q. Did you after that happened make any investigation of the record of Mrs. Just's illness as kept in the hospital to ascertain something about her mental condition?

A. No, sir. I personally thought that she was making fun of me; that was my attitude toward it, because she laughed during the procedure, but she was clear and outspoken and I wasn't at all pleased with it, and I told the nurse so.

Q. Don't you know as a matter of fact that  
737 the hospital record on that very date, March 4, 1936, as initialed by her attending physician, Dr. Howell, says this: "Patient feels very good; talks freely, however is apparently mentally cloudy yet"?

A. I haven't seen that, sir; I didn't read it at all.

Q. You do find that in the record?

A. Yes.

Q. You made no effort on that occasion to go into or consider her mental condition?

A. No, sir; that wasn't my duty.

Q. Was that incident of such significance that you deemed it proper to make a notation of it in the record of her case?

A. Dr. Howell was informed about it or was told about it.

Q. When?

A. When he came to visit her the next day.

Q. He didn't come to visit her that day after this happened?

A. I didn't see him that day, as I recall. I told him of the incident, however, and it was more or less of a laughable matter.



Q. Did you continue then, doctor, in the absence of Dr. Howell, to call in on Mrs. Just and see her after that?

A. I looked in one other time and her back was turned, and she was apparently sleeping, because Miss Dillard put her finger up to her mouth more or less to quiet me down, and I closed the door and didn't see her and she didn't see me.

Q. You say on this particular occasion Miss Dillard was in the room and Mrs. Just's back was toward you as you came in?

A. Yes, because I walked around to the south side, and her back was to the north, and the door was to the north—

Q. What did you say about Mrs. Just's eyes when you walked around and viewed her face?

A. They were closed at the time, and she opened them and looked and peered at me. I was standing at the side of the bed.

Q. Her eyes were closed?

A. Yes.

Q. How were you dressed on that occasion, doctor, when you went into Mrs. Just's room?

A. I don't recall. I know that I had a tie and a shirt on, because she grabbed hold of my sleeve and my arm and my tie.

Q. Was it customary for you to wear any type of uniform, white trousers or otherwise, while you were on duty in the hospital?

A. No; you could wear anything you wished; either scrub-suits that you use in surgery or your own light clothes or your own street clothes.

Q. You don't recall how you were dressed other than the fact that you were in your shirt-sleeves and had on a tie?

A. I had on a tie; I know that.

Q. Doctor, I asked you and I do not believe you answered it fully or at all: Did you make any report of this incident to the staff? By that I mean the persons in charge of the St. Francis Hospital.

A. No, sir; nothing was reported about that  
739      whatsoever.

Q. Never was reported?

A. No, sir.

Q. You didn't deem it of sufficient importance to report it to the staff or those in charge of the hospital?

A. No, sir, because it wasn't a case where the individual had any dire illness or they expected death or anything like that; it was an incident to me that was wholly one that she was making fun of me more than anything else.

Q. As a matter of fact, doctor, isn't it a well known fact that patients in hospitals who are suffering from some mental derangement may do most anything which they would not ordinarily and normally do?

A. Yes, sir.

Mr. Mershon:

That is all.

#### Re-Direct Examination.

By Dr. Parmer:

Q. Doctor, at the time of your encounter with Mrs. Just as you described it, did you observe any mental cloudiness on her part at that time?

A. Not at that time; no, sir.

Q. Did you observe anything about her conduct or attitude which indicated to you that what she was doing would proceed from an unsound mind?

A. Well, at that time it didn't seem so; no, sir.

Mr. Parmer:  
That is all.

740

## Re-Cross Examination.

By Mr. Mershon:

Q. Doctor, when this first happened it came as rather a shock to you, didn't it?

A. Well, it was embarrassing to say the least.

Q. Wasn't it a shock and a surprise?

A. A surprise, yes.

Q. And the personal element in it was very embarrassing to you, wasn't it?

A. Yes, sir.

Q. Now looking at it in the retrospect as a physician and regarding Mrs. Just as a patient who had come into the hospital, as its own records show, suffering from carbon monoxide poisoning, in a semi-conscious condition, and considering that this was the second or third day she was there, and considering that Dr. Howell, who had previously seen her on this day, had written on her record that she was "apparently mentally cloudy yet",—as a physician, leaving out the personal element, isn't it entirely possible that what happened might be explained by her illness and its effect upon her?

A. Well, that is rather hard to say. Dr. Howell when he treated her didn't consider it carbon monoxide poisoning.

Q. He wrote it on the record?

A. Yes, sir.

Q. Now I am asking you as a doctor to consider that it was carbon monoxide poisoning that she was suffering from; and considering that Dr. Howell was honest when he said that she was mentally vague just before you went into that room, couldn't what she did logically be explained as a result of her illness?

A. Well, it could be.

## Re-Direct Examination.

By Mr. Parmer:

Q. You testified that Dr. Howell did not think it was carbon monoxide.

Mr. Mershon:

We move first to strike his statement as to what Dr. Howell considered her condition to be. He is not competent to testify as to what Dr. Howell had in his mind at the time he treated this patient in the hospital.

Mr. Parmer:

But he is competent to testify with regard to what Dr. Howell told him as distinguished from—

Mr. Mershon:

There is not an iota of testimony in this record as to what Dr. Howell told him regarding Dr. Howell's diagnosis of this case, and any attempt to bring in statements of Dr. Howell at this time would be improper re-direct examination.

Mr. Parmer:

I beg to differ. There is testimony by this witness which we have just heard in which he said, when Mr. Mershon asked him to consider only what was in the hospital, the witness found difficulty in answering the question because he said Dr. Howell's real opinion was different.

Mr. Mershon:

The witness volunteered that information to evade answering the question which was put to him, if Your Honor please.

742 Mr. Parmer:

But the answer was finally gotten from the witness without any motion to strike that testimony, and since there was consent to it I think I am allowed to examine him further with regard to—

Mr. Mehrtens:

There is a motion at the present time to strike that portion of the testimony.

Mr. Parmer:

The motion comes too late.

The Court:

The testimony is hearsay, and considering all of the circumstances I think the hearsay doctrine should apply, so I will sustain the objection and grant the motion to strike the witness' testimony as to what was stated personally by Dr. Howell to the witness.

(By Mr. Parmer):

Q. Doctor, in order to arrive at an opinion with regard to whether the physical conduct of Mrs. Just was in any way due to her mental condition, would you have to know what Dr. Howell meant by using the phrase "mental cloudiness"?

A. All of those terms are as vague as neuralgia or headaches. You know, sir, that in medicine everything goes on its individual case, and as I stated before—may I go ahead?

Q. Yes.

A. As I stated before, I felt that it was more or less as a sport and that the whole thing was at my expense, and I told Miss Dillard that at the time, and Miss Dillard laughed, and I told her to go back in the room, for I didn't think she should leave her—just as a matter of keeping her company. Now the gentleman over here (Mr.



Mershon) asked me to consider all cases—asked me if I considered that as an act of incompetency, due to the fact that he felt—may I add Dr. Howell's words—

Q. I don't think you can do that.

743 The Court:

No, I do not think you can do that.

(By Mr. Parmer):

Q. Anyway, doctor, you had an idea of your own.

A. There was doubt whether or not the diagnosis was as stated on the record to be such.

Q. What I want to know is about this mental cloudiness. Does that necessarily mean an insanity?

A. To my mind it does not, sir.

Q. Now if you knew that when Dr. Howell used that term of mental cloudiness he was referring to either the refusal or inability of the patient to remember certain events and only that, would you have any basis in this hospital record for coming to the conclusion that Mrs. Just's actions were the products of a disordered mind?

A. No, sir.

Q. That is all.

#### Re-Cross Examination.

By Mr. Mershon:

Q. So, doctor, you told Miss Dillard that she had better go back and stay with the patient?

A. I told her to go back in the room and stay with the patient.

Q. You thought the patient's condition was such that she needed Miss Dillard with her?

A. I felt that she better go back in there or she might get up and do anything she wanted to.

Q. When patients are suffering from delusions or hallucinations incident to their illness, they do get up and walk around and do strange things, do they not?

A. Yes, sir.

By Mr. Mayne:

Q. Were you subpoenaed here?

A. No, sir.

Q. You came down here voluntarily?

A. Yes.

Q. At whose request.

A. I got in town a week ago last night and called my secretary and she said that Dr. Howell called me, and then I spoke to Dr. Howell and he said that Mr. Parmer and Mr. Coleman would like to get in touch with me, so I called them.

Q. Have you spoken to them about this matter?

A. I saw Mr. Parmer about three or four days ago for about 15 minutes and he asked me what I knew about it and I told him what I have told you.

Q. You came down here voluntarily without any subpoena?

A. Yes, sir.

By Mr. Parmer:

Q. Were you interviewed with regard to this matter sometime before I saw you?

A. Mr. Coleman came to my office about a year ago and he spent about two or three minutes there; I was in a hurry to go out on a call and I hurriedly told him what I remembered of the case and that was all.

Q. Did you tell him all the circumstances that you related on the stand today?

A. Partially. I told Dr. Howell the same thing at that time.

By Mr. Mershon:

Q. Do you know where Miss Dillard is now?

A. I understand that she is in Tye River near Lynchburg, Virginia.

Mr. Parmer:

I will tell you where she is if you want to know.

Mr. Mershon:

Yes.

746 Thereupon DAVID HENRY MULLER (Colored) was called as a witness in behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. What is your full name, Mr. Muller?

A. David Henry Müller.

Q. Where do you live?

A. In Fort Meyers.

Q. What do you work at?

A. I works on boats.

Q. Now were you formerly working on the Friendship II, Mr. Yeiser's boat?

A. Yes, sir.

Q. Prior to the time these ladies were found in their bunks on that morning when you came back to Miami, how long had you been working on the boat?

A. Well, I had been working there before they bought this boat, but prior to that time—I think I started around about the 1st of February.

Q. Were you on the boat when the party left Miami on this voyage that we are concerned with here in this case?

A. I was.

Q. And what was your particular job on that boat?

A. Steward.

Q. What did you have to do as steward?

747 A. I waited on the table, served drinks and waited on them in any way they asked along the line of service.

The Court:

Did you cook, too?

A. No, there was another young man for that.

(By Mr. Parmer):

Q. Who made up the beds?

A. I did.

Q. All of the beds?

A. Yes, sir.

Q. On that trip will you tell us how the various staterooms were occupied?

Mr. Mershon:

We object to the question as being too general.

Mr. Parmer:

I will withdraw it.

Q. Tell me, Mr. Muller, during that trip did the four people occupy the same berths throughout, the same rooms throughout, or did they change around?

A. The ladies had the two berths in the aft-room.

Q. What room did Mr. Yeiser have?

A. He had the room there on the port side, a little small room on the port side.

Q. Did the members of the party keep these rooms during the entire trip?

A. Yes, they *keeped* those same rooms.

Q. And you had to make up the beds?

A. Yes, sir.

748 Q. Now you left Miami, I think, on Friday, was it?

A. Friday afternoon, yes.

Q. Now did you serve any liquor during that trip?

A. I did.

Q. Tell us when after leaving Miami you served your first liquor?

A. After leaving Miami I served the first drink up on deck.

Q. To whom did you serve it and what did you serve?

A. Well, Mr. Yeiser had some gin and water, and the ladies and Mr. McKay had some White Rock—Mr. McKay had ginger-ale in his drink.

Q. You remember that, do you?

A. Yes, sir.

Q. Tell us the next time that you remember serving liquor to the party or any of the members of it?

A. I served it at twelve that night; late that night I served it.

Q. Where were they then?

A. They were on the after-deck.

Q. What were they drinking then?

A. They was drinking practically the same, drinking liquor and gin.

Q. When you say "they" who do you mean?

A. The party, all of them that was in the party, Mr. Yeiser, Mr. McKay and also the ladies.

Q. The next day was Saturday; did you serve any drinks that day?

A. I did.

749 Q. Can you remember when you did it and to whom?



A. I served them with drinks a little before lunch, and Mr. Yeiser had me to bring him some tomato juice. Then Mr. Yeiser went into his room and he called me and I served him his drink there, and I served the ladies and also Mr. McKay a drink.

Q. On Friday night did you serve Mr. Yeiser any liquor beyond what you have already mentioned?

A. Yes, sir.

Q. Did you serve him some liquor beyond what you have already mentioned?

A. Yes, sir.

Q. And where did you serve that to him?

A. In his room.

Q. Who was in the room at the time?

A. One of the ladies; I don't know which one it was.

Q. Can you describe her?

A. I don't know whether it was Mrs. Just or Miss Grunow; I couldn't say which one it was, but it was one of them.

Q. Let's see if we can bring it back to your mind. Do you recall that after you came back to Miami that one of the women went to the hospital?

A. Yes.

Q. And that one of the women stayed on the ship?

A. Yes, sir.

750 Q. Now which of those women was it that was in the room that night when you served Mr. Yeiser?

A. The one that didn't go to the hospital.

Q. That is the one?

A. Yes, sir.

Q. Did you serve her any liquor at that time?

A. No, sir, I didn't serve her any at that time.

Q. Did you notice how she was dressed?

A. Yes.

Q. How?

A. She just had on a gown.

Q. When you say "gown" what do you mean?

A. Night-gown; she was dressed that night for bed.

Q. How was Mr. Yeiser dressed?

A. He had on his clothes, then he had on his trousers and shirt, but he had his shirt open.

Q. What time was this?

A. It was somewhere between eleven-thirty and twelve o'clock midnight.

Q. On the next day did you serve Mr. Yeiser any drinks in the morning?

A. Yes, sir.

Q. At what time did you serve him drinks?

A. Early; he goes and rang the bell right after he got up; I hadn't gotten up yet before he rings the bell, and he asked me to bring him a drink.

Q. What kind of liquor did you bring him?

751 A. Gin and water.

Q. Was he alone at that time?

A. No, sir—yes, he was alone at first.

Q. Now later on when you were next in the room did you see anybody there then?

A. Yes.

Q. Who did you see?

A. I saw this same lady.

Q. How was she dressed at that time?

A. She was dressed in her gown, the same as she was the first part of the night.

Q. Did you serve her any drinks at that time?

A. No, I didn't serve her any at that time.

Q. Now during Saturday, the remainder of Saturday, did you serve any liquor to Mr. Yeiser or to any of the guests?

A. Yes, sir.

Q. To whom, what and how much?

A. I served Mr. Yeiser before lunch and the ladies asked me to bring them some White Rock and cracked ice in their room.

Q. Did you do that?

A. I did.

Q. How long before lunch did that occur?

A. That was I guess around about 30 minutes before lunch.

Q. When you say you brought them some cracked ice, do you mean you brought them only—

A. White Rock and cracked ice and some  
752 empty glasses; that's all.

Q. In order to deliver that cracked ice and White Rock did you go into the room or did you stay outside?

A. I went to the room door and knocked and they went into the bathroom and hollered for me to come in; they closed the bathroom door and asked me to set it on the dresser there.

Q. What did you see on the dresser?

A. There was a pint of liquor sitting on the dresser.

Q. What color liquor was it?

A. It was red; some kind of rye whiskey.

Q. Do you know whether it was rye whiskey or rum?

A. No, sir.

Q. But it was red liquor?

A. Yes, it was red liquor.

Q. Well, during the remainder of the day did you serve anybody with any more liquor?

A. I did.

Q. Tell us who and when it occurred?

A. I served Mr. Yeiser that evening, and Mr. McKay he went in the ladies' room; I guess he went there to get a drink of something.

Mr. Mershon:

I move to strike that.

The Court:

The motion is granted.

Q. You didn't see what Mr. McKay did, did you?

A. No, sir, I didn't.

Q. I want you to tell us what you know from having seen it. Tell us if you served Mr. McKay any that day?

A. I did.

753 Q. When did you serve it to him?

A. I served it to Mr. McKay first a little before dinner that night.

Q. What did you serve him?

A. He had a little gin with ginger ale in it.

Q. During the balance of the evening did you serve any more liquor that you remember?

A. No, sir.

Q. Now on Sunday, in the morning, did you serve Mr. Yeiser any liquor?

A. Yes, sir.

Q. When?

A. Early Sunday morning.

Q. Whereabouts was he then?

A. He was in his room.

Q. What did you serve him?

A. Gin and water.

Q. In order to serve that did you go into the room?

A. Yes, sir.

Q. Was anybody in the room at the time?

A. No, sir.

Q. Did you return to the room at any time later in the morning and find someone there?

A. I returned to the room but I didn't find anyone there.

754 Q. Well, now tell us what drinks, if any, you served on Sunday to any members of the party and tell us which members of the party you served them to?

A. Well, I served them all a drink Sunday; Mr. Yeiser and Mr. McKay and the two ladies also.

Q. And when did that occur?

A. That occurred just a little before lunch.

Q. When did you serve any more, if you did; just go on and tell us.

A. I served some more that evening late after they came off the fishing trip.

Q. Where were they then?

A. They were up on the after-deck.

Q. At dinner did you serve anything?

A. I didn't serve any liquor but I served some champagne.

Q. How many bottles of that did you serve?

A. Well we had two bottles but only used one.

Q. Where was the liquor kept; where was the supply of liquor kept that you used?

A. In the pantry.

Q. On what deck is that?

A. That is in the galley there by the engine-room on the first floor.

Q. Did you have an ice-box on board the ship?

A. Yes.

Q. Where was that located?

A. The ice-box, the big one, was right there  
755 by the "Chief" and the small one was right below the dining-room door.

Q. When you say drinks what do you mean?

A. Ginger ale, White Rock and champagne.

Q. Well during the time you were on the ship did you see any members of the party visiting the pantry?

A. Yes.

Q. Who did you see?

A. I seen the ladies there at the pantry.

Q. Did you see what they did when they got there?

A. They had glasses there and they had a bottle of ginger ale or a bottle of ginger ale, but I walked on back and I did not notice just what they were doing.

Q. You could get ice in that ice box, could you?

A. Yes, sir.



Q. After you served dinner and washed up did you serve the party any more drinks?

A. Monday morning.

Q. I mean on Sunday night after you served the dinner, when you served the champagne, and after you had washed up the dishes,—did you serve the party any more liquor that night?

A. I did.

Q. What time?

A. That night I guess somewhere around between nine and ten o'clock.

Q. Where were they then?

A. That was on the after deck.

Q. What were they doing?

756 A. Sitting back or laying back on the seat, and they had some horse-blankets around them; it was pretty cool that evening.

Q. What drink did you serve them?

A. Gin.

Q. Did you serve them any more drinks that night?

A. No, sir, I didn't.

Q. Now the next morning did you receive word from someone that the two ladies couldn't get up?

A. Well, Mr. McKay he rang the bell and as I went to answer the bell I met him in the hallway and he said to tell the captain to come there.

Q. Did you do that?

A. I did.

Q. Did you go down to where the ladies were?

A. The Captain called me and I went in there and he wanted me to assist him in bringing the ladies out of the room.

Q. Did you assist?

A. Yes, sir.

Q. Tell us what you did in assisting him.

A. Well, Mr. McKay he got her kind of around her shoulders and the captain kind of had her around her body and I held her kind of by the knee.

Q. Are you describing the bringing out of just one of the ladies or did you help bring both of the ladies out?

A. I helped bring both ladies out.

Q. Is that the way you did in bringing both  
757 of them out?

A. Yes, sir.

Q. Now did you observe the condition of the bed that the two ladies were moved from?

A. Yes.

Q. Can you tell us in what condition it was?

A. It was wet.

Q. It was what?

A. Wet.

Q. When you say "wet", do you mean wet or damp?

A. Well, it was wet.

Q. How wet was it?

A. Well, I had to straighten up the bed and I noticed it was wet; I had to turn the mattress up so that it could air and dry.

Q. When you went into this room did you notice any peculiar odor or note anything about the atmosphere—

Mr. Mershon:

That is objected to as leading.

Mr. Parmer:

I will withdraw it.

Q. Well, did you notice anything about the atmosphere when you were in the room?

A. I didn't detect anything.

Mr. Mershon:

Did you see anything or did you detect any odor?

A. I didn't detect any odor I should have said; that is what I meant to say.

758 (By Mr. Parmer):

Q. Where did you bring the ladies?

A. One we put there in Mr. Yeiser's room up on deck and the other lady we laid her out on the after deck.

Q. What did you do then?

A: They asked me to bring something for the lady to vomit in and pretty soon she started to vomit.

Q. Did you bring something for her to vomit in?

A. Yes, sir.

Q. Who helped her—

A. A little short white nurse on the boat there; I can't think of her name now, but it was the day nurse.

Q. This happened after you got into port?

A. Yes, sir.

Q. I want to know what you did during the remainder of the trip after the girls were brought up on deck until the vessel arrived and docked in Miami?

A. Well, I was just there waiting on folks. Mr. Yeiser called me and asked me to give him a towel. I gave him the towel and went back down to the galley and pretty soon he rang the bell again for me to bring him a drink, and I goes in the room, and the lady was in the room and she said, "Is that for Mr. Yeiser", and I said, "Yes, 'mam'," and she says, "Don't give him any more", and I says, "I can't help it; he asked for it", and she said, "Yes, but don't give it to him".

Q. What was his condition at that time?

A. Mr. Yeiser?

759 Q. Yes.

A. Well, he was drinking—drunk—just like he always was; he was just drunk; he couldn't walk either without holding on to something; when he couldn't get anything to lean against then he would catch hold of the upholstering of the boat and then walk along. When there wasn't any railing on the side that is the way he got around, got about.

Q. Is that the way he was that morning?

A. Yes, sir.

Q. Did you see the lady who was out on the open deck again before the boat came into Miami?

A. Yes, sir.

Q. Did you do anything for her?

A. No, sir.

Q. You just saw her there?

A. Yes, sir.

Q. What was she doing?

A. She wasn't doing anything, just laying there.

Mr. Parmer:

I think that is all.

~~Cross Examination.~~

By Mr. Mershon:

Q. What did you say your name was?

A. David Henry Muller.

Q. Muller?

A. Yes, sir.

Q. David, how long have you or had you  
760 been working for Captain Roberts?

A. I have been working with Captain Roberts about eight years.

Q. Did you work with him on his own boat, when he had the boat that he chartered?

A. Yes, sir.

Q. Did you work with him when he had the old Friendship I that he chartered to Mr. Yeiser?

A. Yes, sir.

Q. Did you work with him when he was Captain for Mr. Yeiser on the old Friendship I?

A. Yes, sir.

Q. As a matter of fact, you had been his steward for about 8 years?

A. About eight years, but Mr. Yeiser he would sometimes bring his chauffeur down as a valet and sometimes he would use his chauffeur, but they would take him out on the trips with them.

Q. He is the boy they call Arizona?

A. Arizona Phillips was his name; he was the chauffeur.

Q. Do you remember whether Arizona was on this particular trip?

A. No, he wasn't.

Q. About where was the boat when Mr. McKay rang for you and you went up and told the Captain to come down; did you notice what part of the shore you were opposite at that time?

A. I figured that we was about half way from 761 where we left from that morning early, about half way in to the dock.

Q. How long did the ladies stay up there on deck until they got into dock?

A. They stayed up there I guess pretty near on to an hour or three-quarters of an hour.

Q. Are you just guessing or do you have anything to remember it by?

A. No, sir, I don't have anything to remember it by. It has been a pretty good while ago, but my notion—

Q. You said Mr. Yeiser was drunk on the morning as he most always was? Was he nearly always in that condition?

A. Yes, sir.

Q. His being drunk affected his feet and legs more than it did his mind?

A. Yes.

Q. His mind was pretty clear, wasn't it?

A. That's right.

Q. Even when you call him drunk his mind was all right; he knew what he was doing?

A. Yes, sir.



Q. Now you said a whole lot about serving drinks to Mr. Yeiser. You served him a whole lot more liquor on that trip than you did to any of the guests?

A. Yes, sir.

Q. And you served him separately from them lots of times?

A. Yes, sir.

Q. Now what time in the morning was it, if  
762 you recall, that Mr. McKay buzzed for you this Monday morning?

A. To the nearest of my recollection it was somewhere around eight o'clock.

Q. Was the sun up?

A. Yes, sir.

Q. Daylight?

A. Yes, sir.

Q. Had you gotten up before that?

A. Yes.

Q. You had not given Mr. Yeiser his usual morning drink before that, had you?

A. Yes, I had.

Q. Mr. McKay told you to call Mr. Yeiser?

A. No, he didn't tell me to call Mr. Yeiser.

Q. Who did he tell you to call?

A. Captain Roberts.

Q. Wasn't Mr. Yeiser down there when the Captain came there; wasn't Mr. Yeiser in the stateroom with Mr. McKay?

A. No, sir, Mr. Yeiser wasn't in there at first; I went in there and pretty soon I came back out and then I went back and Mr. McKay went in there. He called for me and then as I was answering he met me in the hallway and he told me to tell the Captain to come there.

Q. Mr. Yeiser had already been in the stateroom?

A. Yes, sir.

Q. Do you know who called him down there?

763 A. No, sir.

Q. If Mr. McKay says he called Mr. Yeiser and Mr. Yeiser came down and went into the stateroom, you would not know any different, would you?

A. No.

Q. David, what makes you think that Mr. Yeiser was in the stateroom before you went in there; did you see him?

A. Yes, sir.

Q. What was he doing when you saw him?

A. He just was walking along singing. He came straight by me and walked on back in the dining salon.

Q. He was walking along singing?

A. Yes, sir.

Q. How long was that before Mr. McKay called you?

A. That was I guess around 15 minutes, 12 or 15 minutes.

Q. Before Mr. McKay called you had Mr. Yeiser walked back from the after-stateroom toward where you were in the dining-room?

A. I didn't see him when he came out of the room, but when I heard him he was singing up on the deck salon.

Q. You say you saw him go back into the after-stateroom?

A. Yes.

Q. And the next thing you knew you heard him singing on the deck upstairs?

A. Yes, sir.

Q. Was it while he was singing up there that Mr. McKay called you?

A. Directly after he ceased singing. That wasn't while he was singing; it was a little later that the bell rang for me.

Q. And Mr. McKay told you to get the Captain?

A. Yes, sir.

Q. You spoke about these beds being wet; how much of the bed was it?

A. It was a round place in there; I guess it was somewhere about this long and about this wide (indicating).

Q. Well, how long would you say in feet that was?

A. I guess it was around about two feet.

Q. And how wide?

A. About a foot and three-quarters.

Q. Were both beds wet?

A. Yes, sir.

Q. Along about the same places?

A. The same places.

Q. You say Mr. Yeiser was up on the upper after deck when the ladies were brought up?

A. No, sir; I don't remember him being up on the after-deck; they were all back there in the room with the ladies when they called for us to come back there—Mr. Yeiser and Mr. McKay. I don't know how Mr. Yeiser got back there, but Mr. McKay didn't tell me to call him; he told me to call the Captain, get the Captain.

Q. After you brought the ladies up out of  
765 the cabin and you put one of them in Mr.

Yeiser's big stateroom upstairs and one of them on the couch on the deck of the boat upstairs, where was Mr. Yeiser?

A. He was going from one to the other; he would look after one for a while and then he would come along and look after the other.

Q. Except for the little difficulty in walking he knew what was going on, did he?

A. Yes, sir.

Q. You say you were in the young ladies' cabin on one occasion and you say you saw a pint bottle of red liquor?

A. Yes.

Q. Could that have been brandy?

A. It could have been brandy; I didn't pay so much attention to it, but it was some kind of liquor sitting there on the dresser.

Q. Was it a full un-opened bottle?

A. No, it was used, and I would say about two or two and a half inches down was missing out of it.

Q. Isn't it true that that was a half pint bottle or pocket size?

A. No, it was a full pint bottle.

Q. Can you get a pint in your hip-pocket?

766 A. You can if it is a pretty big-sized pocket.

I have gotten a pint in my pocket but I guess I have a pretty good size hip-pocket.

Q. Now on this Sunday evening, David, I believe you say you served one quart of champagne at dinner in the dining-room, is that right?

A. Yes, sir.

Q. And later in the evening, between nine and ten, you served some drinks to the guests on the after deck?

A. Yes.

Q. And you served no more that evening to the guests?

A. No, sir.

Q. What were the guests doing when you served them on the after-deck between nine and ten that evening?

A. They were sitting back out there with horse-blankets on them, kind of laying back on the seats, and I put the light out and went on back, but pretty soon the bell rang again and I came back up, and one of the ladies said that burning the light in the deck salon was bothering them.

Q. How much later was that after the time you had left them?

A. That was somewhere around eleven o'clock.

Q. Where were your quarters; where did you sleep on the boat. I call your attention to this floor plan of the boat and ask you to point out your quarters; were they on the cabin deck or main deck or down near the engine-room up in the bow of the boat?

Q. That is on the lower cabin deck?

767

A. Yes, sir.

Q. Did you get any other calls that night from Mr. Yeiser or the guests—that Sunday night after you went up at eleven o'clock and turned out the lights?

A. No, I didn't get no more calls.

Q. How long did they stay up there on that after-deck before they retired, if you know?

A. I don't know.

Q. David, was it warm or was it pretty cool, down on the Keys on that trip from February 28th to March 2, 1936?

A. It was pretty cool; that kind of like a northwest wind; it wasn't cold but the wind was blowing rather strong, which made it pretty cool.

Q. Were you wearing your sweater?

A. No, sir, a white jacket.

Q. A jacket over your regular shirt and undershirt?

A. Yes, sir.

Q. You didn't stay out on deck much, did you?

A. No, sir.

Q. Would you have regarded it as most too cool to fool around the deck in your shirt sleeves?

A. Well, it was late in the afternoon and early morning.

Q. Now you talked about seeing Miss Grunow in Mr. Yeiser's room on the second trip you made there in the morning, on one or two occasions. Do you remember that?

A. Yes, sir.

768

Q. You said she was dressed in her night-gown. Do you mean that she was dressed in very thin clothes or garments, or do you mean that she had on a bathrobe or something of that sort?

A. No, just a one-piece night-gown.

Q. What color was it?

A. Kind of pink.



Q. Did it have any trimmings on it?

A. Yes, sir.

Q. Where were they?

A. Around the collar.

Q. Was it fur, feathers or something of that sort?

A. No, it had some lace.

Q. Did you see a bathrobe or dressing-gown in Mr. Yeiser's room?

A. No, I didn't.

Q. You say you saw her in there on your second trip; was that Saturday morning?

A. Yes.

Q. That was after you had already made the first trip and had served Mr. Yeiser?

A. Yes, sir.

Q. What would you say about Sunday morning?

A. Sunday morning I served Mr. Yeiser.

Q. Did you see her in there Sunday morning?

A. Sunday morning I think it was instead of  
769 Saturday morning.

Q. What time of the day was that?

A. Early that morning.

Q. What do you call early?

A. Before seven o'clock.

Q. It was seven o'clock when you saw her there?

A. A little before seven.

Q. When had Mr. Yeiser waked up and rang for you to bring his drink?

A. About 6:30.

Q. It was after that when you saw her?

A. No, sir.

Q. You did not see her there on the first trip?

A. No, sir.

Q. You didn't see her there when you first went to Mr. Yeiser with his first drink?

A. No, sir.

Q. What time did they serve breakfast on the boat Saturday morning?

A. I couldn't tell you exactly what time it was, but it was mostly after they all got up before I served breakfast.

Q. You remember these things pretty well. See if you cannot figure out by something about what time that they had breakfast on that Saturday morning?

A. It was somewhere between eight and nine o'clock as best I remember.

Q. Breakfast was served in the dining salon?

770. A. No, it was served up on deck.

Q. How about Sunday morning; did you serve breakfast earlier or later than you did on Saturday morning?

A. Sunday morning I served breakfast between eight and nine o'clock.

Q. About the same time?

A. Yes, sir.

Q. Was that the regular time when Mr. Yeiser usually had his breakfast?

A. No, sir.

Q. What time did he usually eat?

A. Sometimes it would be early and sometimes late; he had no special time; he usually got up about ten o'clock and then would eat.

Q. Did you serve him on deck or in his cabin?

A. On deck.

Q. What time did you serve Captain Roberts and Chief Blount on Saturday morning?

A. The chef-cook looked after that.

Q. You did not serve them at all?

A. No, sir.

Q. Who have you been working for since Mr. Yeiser's death?

A. Captain Eddie Johnson; he is on the Yacht Ne-panthe.

Q. Is that yacht over in Fort Meyers?

A. Yes, sir.

Q. Is that a charter boat?

A. Yes.

771 Q. Does it belong to him?

A. Yes, he is the owner.

Q. You have not worked for Captain Roberts since you took the Friendship II back over to Fort Meyers?

A. Yes, sir. When I am in Fort Meyers and not busy I clean house for Mrs. Roberts on Saturdays, and I works on Captain Roberts' boat at times; I worked about three weeks last December on his boat.

Q. Did you serve coffee to the guests or to Mr. Yeiser before you served breakfast?

A. I served coffee to Mr. Yeiser.

Q. You didn't serve it to the guests?

A. No, sir.

Q. Had Mr. Yeiser been accustomed to entertaining guests on board the Friendship II?

A. Yes, sir.

Q. He was away for a short time during the Christmas holidays when his former wife and his children were aboard?

A. Yes.

Q. As a matter of fact there was quite a lot of company aboard the boat all of the time?

A. Yes, there was a pretty good crowd.

Q. Liquor was considered and regarded as a part of the ship's stores, and they always served liquor to guests that came aboard?

A. Yes, sir.

772 Q. Were you cat-in-boy or steward in September, 1935, when Mr. Yeiser came aboard?

A. No, sir; I just helped clean up the boat.

Q. You didn't go on the trip where the boys were overcome by this gas?

A. No, sir.

Q. Were you aboard on one occasion when Chief Blount and Captain Johnson, the fishing guide, were

overcome by some gas while they were on the back of the boat?

A. No, sir.

Q. You never heard anything about that?

A. No, sir.

Q. How often did you go back in the guest quarters to clean up?

A. Very often in the morning, especially when they left out of their rooms. Sometimes I would go in and get half-way through and someone would call me and then I would have to come back and finish.

Mr. Mershon:

I think that is all.

(Witness excused.)

773 Thereupon CARL H. HILTON was called as a witness in behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. What is your full name?

A. Carl H. Hilton.

Q. Where do you live, Mr. Hilton?

A. 64 N. W. 32nd Street, Miami, Florida.

Q. What is your business?

A. Manager of Walker-Skagseth Foodstores, Inc.

Q. Is that located at 56 N. E. First Street, Miami, Florida?

A. Yes, sir.

Q. Now I show you some photostats and ask you if they are photostats of bills issued by that store?

A. Yes, they are.

Q. Now will you tell us what these bills, of which those papers you have in your hand are photostats, were issued for?

A. Various groceries and provisions supplied the yacht Friendship.

Q. Between what dates?

Mr. Mershon:

If Your Honor please, we object to the question because the instruments themselves would be the best evidence of the dates on them, and we further object to any questions concerning these documents because no predicate has been laid for same.

774 Mr. Parmer:

In regard to that I want to inquire whether any objection is being made on the ground that they are photostats?

Mr. Mershon:

No. We object to the introduction of these papers. I assume that you are going to—

The Court:

Let him explain what they are and then hand them to counsel.

(By Mr. Parmer):

Q. Between what dates do they cover supplies sold and delivered on the Friendship II?

A. Between the dates of February 17th and 28th, 1936.

The Court:

Before you go into the details of them submit them to counsel.



Mr. Parmer:

I have done that, Your Honor.

Q. Were the bills from which these photostats were made made in the regular course of your business of running a grocery-store?

A. Yes, sir.

Q. Do they show what you actually sold and delivered to the Friendship?

A. Yes, sir.

Mr. Mershon:

We move to strike that question and answer, if Your Honor please. The witness was asked if these bills show that the goods therein mentioned were sold and delivered to the yacht Friendship II, and the answer was yes—

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Mr. Parmer:

I did not ask that precise question.

The Court:

You might ask him if they show that they were paid for, but the question as now framed is not proper because there is no delivery shown on them.

(By Mr. Parmer):

Q. Then, Mr. Hilton, did you receive payment for the items shown on these sheets?

A. We have received payment in full.

Q. You have?

A. Yes.

The Court:

Who made the payment?

The Witness:

These payments were usually made by check, but I don't remember who signed the check.

Q. But you have no outstanding account with the owners of the Friendship II?

A. No, sir.

The Cou

Now, do you want to renew your objection in the light of—

Mr. Mershon:

When counsel makes the offer I would like to have the privilege of interrogating the witness.

Mr. Parmer:

I want to make an offer of offering these three sheets in evidence.

Mr. Mershon:

Do you make that for any special purpose?

Mr. Parmer:

Yes, to show particularly the purchases on the 26th of February and on February 28th.

Mr. Mershon:

What particular purchases do you offer them to show?

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Mr. Parmer:

Well, on the 26th of February the purchase of 12 quarts of assorted wines at \$27.90, and on February 28th the following purchases: Six tins of Baker's Coconut; one Salad Dressing; 12 celery; one carton of Camels; one carton of Kool Cigarettes; two cases of bottles; one case of orange juice—

Mr. Mayne:

What about the bottles?

Mr. Parmer:

Two cases of bottles, one dollar; one case of coca cola, one case of Pabst Beer, six pounds of shrimp and 12 quarts of assorted wines.

Mr. Mershon:

May I interrogate the witness?

Mr. Parmer:

Yes.

By Mr. Mershon:

Q. Mr. Hilton, when was this so-called bill paid, actually paid to Walker-Skagseth?

A. That will have to be looked up on the books. I don't remember.

Q. Was it on the date of this instrument, March 2nd, 1936?

A. Not necessarily.

Q. As a matter of fact you have no knowledge whatsoever of any of the items shown on this statement?

A. Our bookkeeper made that bill.

Q. You know nothing about either the making of the bill or the delivery of the items referred to in it, do you?

A. No. We never get a receipt for goods delivered to yachts, and that is the way we make our bills.

Q. You have a man in your employ available here in Miami who delivered any articles that might be mentioned herein, any articles which were actually delivered to the yacht Friendship II, don't you?

A. We have several drivers delivering to various yachts.

Q. Do you know which driver made the so-called delivery of these items?

A. We never keep a record of which driver delivers them.

Q. Do you know of your own knowledge that the 12 quarts of assorted wines here shown were actually delivered to the yacht Friendship II on February 26, 1936?

A. Yes, by that bill that certainly were delivered.

Q. I will have the question repeated, and I would like for you to weigh every word of my question.

(Thereupon the preceding question was read by the Reporter as above recorded.)

A. I—

Q. Of your own knowledge.

A. Well, we did business—

The Court:

That is not what he asked you. He asked you a plain question: Do you know of your own knowledge? You can answer that yes or no.

A. By that bill I would say yes.

The Court:

He is not asking you to answer with respect to that bill. He is asking you the plain question whether you know of your own knowledge.

A. I don't remember seeing the goods go out,  
778 but I know they did go out.

Q. Did you see them delivered?

A. I didn't see that. Lots of goods go out that I never see.

Q. You do not make deliveries?

A. No, but we can get the driver who made the delivery.

Q. Exactly, and that is the question I asked you awhile ago.

A. We have two drivers that deliver to yachts and it was either one or the other.

Q. Is the same thing that you just stated true regarding the so-called 12 quarts of assorted wines charged under date of February 28, 1936, that is, do you know of your own knowledge by having seen the 12 quarts delivered, 12 quarts of assorted wines delivered, that they were delivered to that yacht on February 28, 1936?

A. I don't remember seeing them go out.

Q. And you can also get the man who did?

A. We can get the driver that will know, because he took it there.

Q. You don't even know what kind of packages these alleged quarts of assorted wines were in, do you?

A. I don't remember seeing them go out.

Q. Now when you fill an order and send packages and merchandise out and deliver it, what sort of memorandum do you send along with it?

A. We send a little sales ticket which is about three inches by six inches.

Q. And that is your original entry of that transaction, is it not?

A. Yes, sir.

Q. And from these original entries subsequently the transactions are posted on your ledger, is that right?

A. That is right but I am not the bookkeeper.

Q. You are the manager?

A. Yes, but I do not have any access to the books.

Q. You have no access to the books?

A. No.

Q. But you know of the system by which your business is run, don't you, as manager?

A. I don't exactly know the bookkeeping system, but I know these charges are posted from the tickets.

Q. To what?



A. To a ledger.

Q. And where then are the tickets from which this combined statement was later made up and sent in the form of a bill to the customer?

A. They were put in our basement and the Fire Department came along and asked us to have that basement cleaned out, so they were all destroyed.

Q. Your original tickets were destroyed?

A. Yes, sir.

Q. Now this thing right here was copied off the ledger, wasn't it?

A. That was copied from the sales' tickets.

780 Q. Did you copy it?

A. No, but the bookkeeper did.

Q. Did you see it copied?

A. I didn't see her copy that individual one.

Q. I am asking you about this one?

A. I don't remember seeing her copy that.

Q. You just said you didn't know much about the bookkeeping system and the way it operated, didn't you?

A. Yes, I don't know about the bookkeeping system.

Q. And you don't know anything about this instrument, do you, of your own knowledge?

A. I know that bill was made from sales tickets and I know the bookkeeper made it.

Q. Did you see her make it from the sales tickets?

A. Not necessarily that one, but she made it anyway.

Q. Didn't you say it was customary to post your sales tickets into your ledger account?

A. Well, I think that is the way it is done.

Q. Isn't a bill such as this copied off of the ledger account?

A. This bill is copied from the sales tickets as far as I understand.

Q. Do you know?

A. Not positively, but I think so.

Q. You say this is not the ledger account as it stands on your ledger of your company?

A. No. I thought I was called up to identify  
781 handwriting. I don't know anything about the bookkeeping part of it.

Q. Then in trying to identify this paper here you cannot say, because you do not know, that this paper is correct and represents the account as shown on the ledger of your company?.

A. That is made from our sales tickets and the goods delivered to the yacht Friendship. They were delivered and we can get the driver who delivered them. He is in New York now.

The Court:

Where is this man now?

The Witness:

He is in New York now; he is one of our drivers that delivered to yachts last winter.

(By Mr. Mershon):

Q. Where are the drivers that delivered to these yachts last winter?

A. One is in New York.

Q. What is his name?

A. His name is Herbert Briggs, and the other fellow—I can't think of his name now.

Q. Let that go temporarily. Who purchased the items shown on here under dates of February 26th and February 28th, respectively, 12 quarts of assorted wines?

A. I don't know. I couldn't tell you that.

Q. You don't know whether it was Captain Roberts?

A. I couldn't tell you.

Q. You don't know whether it was Mr. Yeiser?

A. I couldn't tell you that.

Q. And so far as you know, even though  
782 these items might have been charged to the  
Friendship II and later paid, you cannot say  
that these 24 quarts of assorted wines ever got aboard  
the yacht Friendship II, can you, as far as you yourself  
know?

A. Since that bill was made up by our bookkeeper  
evidently it was delivered to the boat.

The Court:

You stated you thought you were called here to identify  
handwriting?

The Witness:

Yes, sir.

The Court:

Whose handwriting?

The Witness:

What?

The Court:

Whose handwriting is that?

The Witness:

This was made by Mrs. Itzel, the young lady that took  
care of the yacht bills.

The Court:

Where is she now?

The Witness:

She is at the Columbia Market, at the City Hall, New  
York City.

The Court:

What position did she hold with your store at that time?

The Witness:

She held the position of billing clerk; she took care of the yacht billing, and naturally she made out all of the bills for the yachts.

The Court:

When goods were sold to different boats did she look after the individual bills?

783 The Witness:

That all went to her, Your Honor, and she made them up into one big bill.

The Court:

Is there anybody there in your institution that does that today who succeeded her?

The Witness:

We have no yacht business today; that is just in the wintertime:

The Court:

Your regular business is all around—all year around business—

The Witness:

Yes.

The Court:

Do you handle that the same way as you did the yacht business?

The Witness:

Yes, sir.

The Court:

Have you got a bookkeeper?

The Witness:

Yes, sir.

The Court:

Does that bookkeeper keep ledgers?

The Witness:

Yes, sir.

The Court:

As I understand, you do not know whether he copies the bill that is sent out to the purchaser from the sales ticket on to the ledger and then the bill is mailed to the purchaser—whether that is copied from the ledger you do not know that?

The Witness:

No, I don't know anything about the bookkeeping.

The Court:

Would your bookkeeper know about that?

The Witness:

Yes, sir.

The Court:

Who is your bookkeeper?

The Witness:

Miss Mary Christian is our bookkeeper.



784 The Court:

Is she available to come up here today?

The Witness:

I think so. I will ask my superior.

The Court:

I think we had better have the bookkeeper. On the present showing the offer is rejected.

(Witness excused.)

785 Thereupon PHILLIP CHARLES NYE was called as a witness in behalf of the Petitioner; and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. What is your full name?

A. Phillip Charles Nye.

Q. Where do you live?

A. Fort Myers, Florida.

Q. What is your general business?

A. Sailor on a yacht.

Q. Were you formerly a sailor on the yacht Friendship II?

A. Yes, sir.

Q. Were you a sailor at the time that vessel put out from Miami on February 28th and returned later on March 2, 1936?

A. Yes, sir.

Q. Do you remember the occasion when two ladies were found in their bunks on the morning of March 2, 1936?

A. Yes, sir.

Q. Did you see them in their bunks?

A. No, sir.

Q. Do you remember what you were doing at the time they were found in their bunks?

A. I was in the pilot-house with the captain.

Q. Did the captain leave the pilot-house at 786 that time?

A. I think the waiter or someone came up and told him that he was wanted and he gave me the wheel.

Q. Now during that trip which began on the 28th of February and ended on March 2nd, did you observe the members of the party from time to time?

A. Yes, I did.

Q. As a sailor on board that yacht where did your work take you?

A. On deck most of the time.

Q. On just one part of the deck or other parts?

A. Well, fore and aft.

Q. Now on Sunday in the evening did you see the members of the party any place?

A. Yes, sir.

Q. What time did you see them and where did you see them?

A. I saw them after they came in from fishing, and then later that night I went back aft to let down the curtains after they had gone into the deck salon.

Q. What time was it that you went back to let down the curtains?

A. I don't know exactly; I think it was around 10:30 or 11:00 o'clock. I don't remember exactly.

Q. What curtains did you have to let down?

A. Back there on the stern; we have awnings on each side to let down to keep the dew and moisture out off the tables and lounge.

Q. Did you actually do that work that night?

787 A. Yes, sir.

Q. You say you saw the party in the "saloon"?

A. They were in the "saloon" at the time I went aft to take care of my chores.

Q. Well now did you observe anything with regard to their actions? Answer that yes or no?

A. Yes, sir.

Q. Well, tell us what you observed, and when I say "observed" that does not mean just what you saw with your eyes but it includes what you heard with your ears as well?

A. When I walk by I don't usually hang around and watch what they are doing, but I did observe that they were drinking and carrying on and having a party.

Q. That is all you observed with regard to them?

A. Yes, sir.

#### Cross Examination.

By Mr. Mershon:

Q. When did Captain Roberts come back and take the wheel from you after Muller called him to go down in the guest-cabin?

A. About half an hour, if I remember right.

Q. You say that it is customary every night to go down and drop those curtains around the after deck to protect that lounge on the after deck?

A. Yes, sir, that was my duty.

Q. When do you raise them again?

A. In the morning.

Q. After breakfast?

A. Yes.

788 Q. Had you raised them that morning coming up from Featherbed Shoals this Monday morning; had you already raised them at the time these girls were found in their bunks?

A. Yes, sir.

Q. You had already raised them?

A. Yes, sir.

Q. How long had you been up?

A. You mean before I raised the curtains?

Q. Yes; that morning?

A. I don't know how long.

Q. How long—do you know what time you had breakfast that morning?

A. I think we had breakfast before we started.

Q. You had breakfast before you started from Featherbed Shoals?

A. If I remember right.

Q. Do you recall what time it was you started?

A. No. I think it was early, but I don't know the exact time.

Mr. Mershon:

That is all.

Mr. Parmer:

I have no further questions of this witness.

(Witness excused.)

789 Thereupon FRED D. SUMMERS was called as a witness in behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

#### Direct Examination.

By Mr. Parmer:

Q. What is your full name?

A. Fred D. Summers.

Q. Where do you live?

A. I lives in Fort Myers; that's where I am living now.

Q. What is your general business?

A. Well, cooking in general.

Q. Were you cook on this yacht Friendship II of Mr. Yeiser's?

A. Yes, sir.

Q. Were you cook on that boat at the time it left Miami on February 28th and returned with these two girls in their bunks?

A. Yes.

Q. You were cook at that time?

A. Yes, I was cooking at that time.

Q. Well now when you were doing your work on that boat where did you stay when you were doing it?

A. I am ordinarily in the pantry and in the kitchen back there.

Q. Did you have any liquor in that pantry?

A. Yes, sir.

Q. Where did you have it?

A. Had it right there on the "dresser".

790 Q. You say on the dresser?

A. Yes, on the dresser.

Q. Did you have an ice box there?

A. Yes, sir.

Q. What did you have in the ice-box?

A. We had ginger ale, some White Rock, and had some champagne at the present time, too.

Q. When you say "at the present time", do you mean at the time of the trip?

A. Yes, the time when the party was on. And my vegetables and things I kept them in there, too, and the chickens and things was kept in the box also.

Q. Did you see any of the members of the party come into the kitchen?

A. Yes.

Q. And into the pantry?



A. Yes, in the pantry; both the pantry and kitchen connects together.

Q. I am talking about this trip now.

A. I know what you are speaking about.

Q. Now what did you see them do?

A. I only saw the two ladies come in about midnight, and they had a drink, a little sip of gin in a little water I suppose. That's about all I seen them do.

Q. You saw the ladies come in there by  
791 themselves?

A. Yes.

Q. How many occasions did that happen?

A. Just one, and that was Sunday night.

Q. You never served any of the drinks?

A. No, sir; I didn't serve none.

Mr. Parmer:

That is all.

### Cross Examination.

By Mr. Mershon:

Q. What time did you start work in the mornings on that boat when she was off like that?

A. What?

Q. Well, what time did you get up?

A. I got up about 5:30.

Q. What time did you knock off and go to bed?

A. Sometimes from twelve to twelve-thirty it was before I got through cleaning up the kitchen.

Q. How often did you do that?

A. Quite often.

Q. You worked until about twelve or one and you got up about five?

A. Well, at 5:30 I got up and had my breakfast ready at about eight o'clock, supper—I means dinner—about one o'clock—

Q. Have you got a pretty good memory, Fred?

A. I have a pretty fair memory.

Q. You remember where the liquor was in the pantry?

A. Oh, yes I remember where all of that was.

Q. What time did you serve breakfast to the  
792 guests and to Mr. Yeiser on Saturday morning  
after you left here on Friday?

A. I usually served breakfast at eight o'clock, but I never watched the time really to know what the time was. We usually served breakfast at eight o'clock and we served the crew at seven.

Q. You have no recollection now of being down there on that boat and serving breakfast at any particular time on this trip?

A. No, sir. I have no recollection of the particular time but I know it was eight o'clock that we served breakfast. I never watched the time of it because I was busy.

Q. Were the meals ever served late?

A. Yes, we have served late meals.

Q. What time did you serve breakfast on Sunday morning down there; do you remember that particular time?

A. I don't remember the particular time, but eight o'clock is the time when they had their breakfast.

Q. When you are out with guests you may go ahead and serve the crew, but you do not serve the guests until they get ready, do you?

A. No.

Q. In other words, you were not running a boarding-house and ringing a bell for them to come to eat?

A. No. When they got ready they would eat  
793 their meals. You couldn't set any certain time, because they go fishing sometimes and they come in past the time, so we serve them when they comes in.

Q. Now how late were you in the kitchen that Saturday night on that trip down there?

A. I don't remember how late it was, but it was around eleven-thirty to twelve.

Q. Now on Sunday night what makes you think it was around twelve?

A. What makes me think it?

Q. Yes—when you saw the ladies?

A. I know it was, because I got through working about that; we had late meals and I was in the kitchen cleaning up.

Mr. Mershon:

That is all.

Mr. Parmer:

This is the last witness I will be able to call today. I have in addition four witnesses and I am sure not more than five, and I am quite sure that I can complete it in half a day, Your Honor, if you are willing to put aside tomorrow for us.

Mr. Mershon:

If Your Honor pleases, I am not complaining, but under the circumstances we feel that the petitioner has held this thing up a little bit. Your Honor has given us some additional time and we feel that he should have been prepared to go forward here as the Court might direct in order that he may not use up the time you are giving us tomorrow. In other words, by not utilizing the time today, he will probably deprive us tomorrow of  
794 the privilege of the short rebuttal which we have been patiently waiting to make.

(Discussion off the record.)

The Court:

We will take an adjournment until 9:30 tomorrow morning.

(Thereupon an adjournment was taken to 9:30 A. M., October 14, 1937.)

795 Miami, Florida, October 14, 1937, 9:30 A. M.

Morning Session.

The Court:

All right, gentlemen, I am ready to proceed.

Thereupon H. C. MICKLE was called as a witness in behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. Mr. Mickle, I believe your initials are H. C.?

A. Yes, sir.

Q. You live where?

A. 1936 S. W. Second Street, Miami.

Q. By whom are you employed at the present time?

A. Standard Brands, Inc.

Q. What do you do?

A. I am a route salesman.

Q. In February and March, 1936, were you employed on the Friendship II?

A. Yes, sir.

Q. What was your job?

A. Sailor.

Q. Now do you remember the occasion with  
796 that vessel left Miami on Friday, February 28,  
1936, for a cruise down the bay and returning  
on March 2, 1936, with two ladies in their bunks who did  
not arouse when called? Do you remember that occasion?

A. Yes, sir.

Q. You were not on the boat at the time when the ladies were aroused, were you?

A. No, sir.

Q. Where were you?

A. I was aboard a cruiser towing another launch. I left the big boat before we came into the dock.

Q. Now you had been on the boat during the trip down, had you?

A. Oh, yes.

Q. Had you observed the conduct of any members of the party, and by party I mean the four passengers, during the days that you were engaged on this excursion?

A. Yes, sir.

Q. Did you observe any drinking?

A. I am not sure.

Q. Well, if you are not sure let's don't have it. After the vessel returned to Miami and after the excursion was over, did you go on board the big boat, Friendship II?

A. Yes, immediately after we tied up?

Q. Did you receive any instructions with regard to speaking about what had taken place?

A. Yes.

Q. What instructions did you receive?

797 A. I was told not to say anything about it to anybody.

Q. Well now when you did go on board the big boat what did you see?

A. I don't remember what part of the boat I went on. I probably was up around the bow; I don't remember exactly now.

Q. Well did you see two women?

A. Yes.

Q. Where did you see them?

A. Mrs. Just was on the stern of the boat and Miss Grunow was in Mr. Yeiser's room, stateroom.



Q. Well now during the morning were you at any time alongside of Mrs. Just?

A. Yes.

Q. About what time was that?

A. I would say about ten o'clock.

Q. Did you see anything occur in which Mrs. Just was concerned while you were there?

A. Yes.

Q. Tell us what it was.

A. She was laying there apparently sick. I remember the nurse bringing some medicine, I guess, or something in a glass over to her, and I remember she turned her head away and said she didn't want it.

Q. Who said that?

A. Mrs. Just.

798

Q. Now did you see Miss Gruner that morning?

A. Yes. I went inside the stateroom and talked to her.

Q. You talked to her?

A. Yes.

Q. Did she say anything?

A. Yes. The first thing I asked her naturally was how she felt and she said she felt pretty good but that she had a headache and she said that as long as she left her head still it did not bother her much.

Q. How long were you in there talking to Miss Gruner?

A. Possibly two or three minutes.

Q. Did you have any other conversations with Miss Gruner during the day?

A. I don't think so.

Q. Did you come close to Mrs. Just?

A. I helped to carry Mrs. Just off the boat.

Q. Did you observe anything about her condition at that time that you remember now?

A. No. She appeared to be awake. I don't remember any conversation. We helped those ambulance drivers carry them out and put them in the ambulance—

The Court:

Speak louder.

A. I meant Mrs. Just; just her.

Q. Were you present at night when Mrs. or Miss Gruner left the vessel?

A. Yes, sir.

Q. Did you hear her say anything at that  
799 time?

A. I heard her telling the crew goodbye.

Q. That is all you remember about that?

A. That is all.

Mr. Parmer:

You may examine.

Mr. Mershon:

No questions.

The Court:

You may be excused.

800 Thereupon MARY CHRISTIAN was called as a witness in behalf of the petitioner, and having been first duly sworn, was examined and testified as follows:

### Direct Examination.

By Mr. Parmer:

Q. What is your full name?

A. Mary Christian.

Q. Where do you live?

A. On the Beach.

Q. What is the street number?

A. 1320 Washington.

Q. You are employed by Walker-Skagseth Food-stores?

A. Yes, sir.

Q. How long have you been employed by them?

A. About three years.

Q. What is your job there?

A. I am a bookkeeper.

The Court:

Speak a little louder, young lady.

Q. I take it that you are acquainted with the system that they have there of keeping their books?

A. Yes.

Q. Are you acquainted with the system that they have for recording the purchases and sales of supplies to yachts?

A. I don't take care of the yacht department; they have a different girl in the winter to take care of the yachts.

Q. Do you know what the system is in general for recording sales and purchases that go from the store?

A. They just make up the bills from the tickets.

Q. What are the tickets you refer to?

A. Purchase sales tickets.

Q. When are they made?

A. When someone comes in and buys something or orders something. The original is kept by the office and the duplicate goes to the person who gets it.

Q. And those are called sales tickets?

A. Yes, sir.

Q. Who gets those sales tickets?

A. They come upstairs to the yacht "girls" and the others I get.

Q. From these tickets what bills do you make out?

A. I don't do any billing; the ones I make just runs through the bookkeeping machine.

Q. Do you mean to say that you take the tickets that are presented to you and you total them, is that right?

A. Yes, we just total the amount at the end of the sheet, total the tickets, and those are posted in the total amount. That is the regular custom, but on statements to yachts they have to employ an extra girl to write everything up when they go out.

Q. You have seen that done, have you?

A. Yes, I have.

Q. By the regular girl who does it?

802

A. Yes, sir.

Q. Now I want you to look at this, which is a photostat of a certain bill issued by your concern—

The Court:

Just let her tell what it is.

Q. All right; can you tell us then what that is?

A. This is a bill to the yacht Friendship for supplies.

The Court:

Now what is in the store where you work, that is, do you have something there which would be the original of which this is a picture?

A. No, the original would be sent to the owner.

The Court:

Is there at the store now another one similar to the original of that bill?

A. There was a third copy made, and all of these records have been destroyed, because the city had us

to clean out the basement last summer on account of fire hazards.

The Court:

Miss Witness, when a bill of goods is sold to a yacht the original was kept or is kept in the usual course of business and the duplicate went to the owner, is that right?

A. Yes, the tickets themselves were kept.

The Court:

Is that ticket ever posted onto a ledger?

A. Well, they have loose-leaf sheets.

The Court:

Are the items posted on that ledger which are purchased, the items of merchandise or just the total amount of the purchases?

A. I think the total amount of the bill is  
803 posted on the ledger sheet. This 460.29 was  
evidently posted, being the amount of this bill.

By the Court:

Q. What is the date of the purchase on that?

A. 17th of February.

Q. Now when there was a posting made on the book which showed these purchases on that date in February, did that posting consist of an exact copy of what was on the sales ticket or was it just the total amount that was sold that was posted to the account against that particular yacht?

A. Just the total amount would be posted for that day.

Q: Is it true then that this bill, which is a statement of account, of which this is a photostatic copy, was made up by a bookkeeper writing on to this bill all of the items that were unpaid as against that particular yacht?



A. The bills are made from the original slips, and they just copy whatever is on the bill, but that doesn't go on the ledger or anything, what they get is just the total.

By Mr. Parmer:

Q. But you were acquainted with the operations of the girl in that department?

A. Yes. Of course she was acquainted with that kind of work; she took care of it mostly herself, but I know she did that billing because I recognize the writing.

By the Court:

Q. What is her name?

A. Miss Itsel.

804 Q. Where is she now?

A. Well, she is in Staten Island, New York.

Q. Do you recognize her handwriting?

A. Yes, sir.

Mr. Mershon:

Mr. Parmer, did the estate pay that bill?

Mr. Parmer:

Either the estate or the guardian of Mr. Yeiser.

Mr. Mershon:

It was filed as a claim after Mr. Yeiser's death?

Mr. Parmer:

I don't think it was filed as a claim but it was filed in the probate proceedings in order to show an expenditure made by the guardian during Mr. Yeiser's lifetime.

Mr. Mershon:

As far as you know Mr. Yeiser never saw this statement in his lifetime?

Mr. Parmer:

No; the bills were paid by the guardian and that is where the bill was sent.

Mr. Mershon:

Do you know whether that was paid after Mr. Yeiser's death or before?

Mr. Parmer:

That I do not know.

Mr. Mershon:

If Your Honor please, I do not think the predicate has been laid to put this in evidence, but we are willing to stipulate in the record that the records of Walker-Skagseth show that on these dates these supplies were charged and billed to the Friendship II as merchandise sold.

805 Mr. Parmer:

I will accept that, that the goods were sold and paid for on the dates in question.

Mr. Mershon:

Not paid for on the dates in question.

Mr. Parmer:

No, but sold on the dates in question and paid for later. I assume that Mr. Mershon does not want to admit delivery. I do not say that I have proved it, however, on the other hand, I do not want it understood that I am waiving the inference which can be taken from the fact that the goods were sold and paid for.

Mr. Mershon:

Apparently, Your Honor, they have identified these instruments as having come from this store, and we have

no objection to letting them go in with the understanding that we object to them being offered as proof of delivery of any of the articles in question.

Mr. Parmer:

That is agreeable.

The Court:

All right, let them be filed in evidence.

(Thereupon the photostatic copies of statements were marked Petitioner's Exhibits 6-A, 6-B and 6-C, respectively.)

(Witness excused.)

806 Thereupon: DOCTOR SPENCER HOWELL  
was recalled as a witness in behalf of the Defendant, and was examined and testified further as follows:

Re-Direct Examination.

By Mr. Parmer:

Q. Doctor, since you gave your testimony have you found that you made a mistake with respect to a portion of it?

A. Mr. Parmer, in checking over my records, I would like to correct the dates of Mr. Yeiser's treatment by me, the time I attended Mr. Yeiser, if you please.

Q. Go ahead and state what you found out.

A. My records in the office show that I was in attendance on him on the night of February 18 to—

Mr. Mayne:

We object to it and say that the records speak for themselves. If he has such records, let him produce them.

Mr. Parmer:

Very well, I will ask him another question.

(By Mr. Parmer):

Q. Since attending at the trial have you refreshed your recollection from your records with regard to the time during which you treated Mr. Yeiser?

A. I have.

Q. Will you tell us when you began to treat Mr. Yeiser?

A. February 18th.

Q. Of 1936?

A. Yes.

Q. When did it end?

A. March 7, 1936.

807 Q. At that time had he died or did he die?

A. I suppose so; my records show that that was the conclusion of the case.

Q. But you do remember that he did die?

A. Yes, he died.

Mr. Parmer:

That is all.

#### Re-Cross Examination.

By Mr. Mershon:

Q. Doctor, you mean by that that you now withdraw the statement that you made under oath that you had treated Mr. Yeiser for about two months?

A. Mr. Mershon, I suppose I am under oath at the present time; at least, I trust I am, but I would like to make that correction if it is possible.

Q. By that you abandon that other statement altogether?

A. Yes. The records will show that I said from six weeks to two months.

Q. And in making the statement you now make tonight you rely upon the contemporaneous record that you made at the time?

A. Yes.

Q. And that is the basis of your testimony tonight, that you attended him only from February 18th to March 7th; I mean your record is the basis of that?

A. Yes.

Q. The record that you made at the time?

A. Yes.

Q. Are you also now prepared to rely upon  
808 the record which you made in the St. Francis Hospital about your diagnosis of Mrs. Just?

A. That record stands as my testimony indicated yesterday.

Q. You are relying on your testimony rather than the records that you put in the St. Francis Hospital?

A. No; that went through the Court yesterday.

Q. You don't want to change that?

A. No.

Q. You don't want to rely on your record in your handwriting as to that?

A. I don't care to change it.

Q. Doctor, now with this change in your testimony, do you wish to change the other part of your testimony wherein you testified yesterday that you began treating Mr. Yeiser on, namely, February 17th and it continued to February 28th. You will recall that the boat left on February 28th for a cruise down on the Keys,—so you treated him from February 17th to the 28th, ten days?

A. If that is what the record shows.

Q. You say you started treating him on February 18th?

A. Yes.

Q. And you stated that the boat left on the cruise down on the Keys where the ladies were injured,—that the boat left about February 28th.



A. I can look that up for you.

Q. You know it was Monday when the boat got back, don't you?

A. Yes.

809 Q. You know it was Friday before that Monday that the boat left to go down to the Keys?

A. I think that is right.

Q. And you know that Monday was March 2nd?

A. That is right.

Q. And you know that Sunday would be March 1st?

A. Yes.

Q. That Saturday would be February 29th?

A. Yes.

Q. So therefore when the boat left would be February 28th?

A. That is right.

Q. So you treated Mr. Yeiser ten days, is that correct?

A. That is right.

Q. And you testified that within the period you were treating him that you brought down his liquor consumption from one gallon of gin a day to four ounces per day?

A. Yes.

Q. By progressive treatment?

A. Yes, sir.

Q. You brought it down to that in a period of ten days?

A. Yes, sir.

Mr. Mershon:

I think that is all.

### Re-Direct Examination.

By Mr. Parmer:

Q. Doctor, when you were first called to treat Mr. Yeiser where did you find him?

A. Where did I find him, sir?

810 Q. Yes, where was he?

A. Aboard the boat.

Q. In what condition was he at that time?

A. Pretty bad.

Q. To be more particular, tell us just what it was.

A. Well, he was completely under the influence of alcohol; he was sick; his legs were bad under him; that's about the best picture that I can paint to you.

Q. Prior to this going on this yacht did he come ashore at any time?

A. No, sir. At least he told me he didn't; I could not say whether he did or didn't, but he told me he had not been ashore in six months.

Mr. Mehrtens:

I move to strike both the question and the answer on the ground of hearsay.

Mr. Parmer:

To the latter part of it I will consent.

(By Mr. Parmer):

Q. Now you saw him on the boat each day?

A. Yes.

Q. Did you notice any improvement in his condition?

A. Yes, sir.

Q. Did you get your report with regard to the amount he was consuming from someone on the boat?

A. Yes.

Q. From the nurses?

A. Yes, sir.

811 Q. Now on the day or the day before he left on this cruise, did you receive any report from the nurses with regard to their having been ashore with him?

A. Yes, sir.

Q. You went ashore with him yourself?

A. No, sir. I might say that I saw him one day returning to the boat.

Q. When was that; was that the day before he left on the cruise?

A. I can't say definitely the time, but it was right at that time.

Q. It was just before he went on the cruise?

A. Yes, sir.

Q. He was with the nurses when he came back?

A. Yes, sir.

Q. But you don't know of any time that he was ashore during the time that you treated him?

A. No, sir.

### Re-Cross Examination.

By Mr. Mershon:

Q. Doctor, did you call the day nurse and the night nurse who attended him while you were treating him?

A. Yes. They seemed to have been with him before; they—some other doctor had taken care of him at some other time in the past; I don't know who he had.

Q. Did you find the nurses or did you bring in new ones?

A. No, I used those nurses.

Q. Who called you on that case; did Mr. Yeiser  
812 himself do it or did his captain?

A. I don't know whether he instructed that I be called or not; I know that I received the call.

Q. You don't know from whom you actually got the call?

A. Not definitely, but I was welcomed apparently by Mr. Yeiser.

Q. Did Captain Roberts call you on that case?

A. I can't say; I don't know; I know that I received the call and went to the boat, and that's all I know.

Q. Did you receive it personally or did it come to your office?

A. I don't know whether it came to my office or not; I don't think I received it personally; I am not sure about that.

Q. Do you remember the circumstances of your first visit to him?

A. What do you mean by that?

Q. Well, do you remember what time of the day it was that you went there and just who you met when you came aboard?

A. Well, I could go into a bit of detail on that.

Q. Is that shown on your records or are you remembering that?

A. This is just my memory.

Q. Yet you don't know how you got the call in the first place, whether you received it personally or whether it came to your office?

A. That was a trifling thing; you don't remember how you get calls; I wouldn't remember that unless there had been something unusual about it.

Q. There was nothing unusual about this call?

813

A. There wasn't anything unusual about that call, but I regretted that I had a drunk to take care of.

Q. You had that information when you got the call that you were going to take care of a drunk?

A. No, I got that information after I got there.

Q. Then you were not regretful until you got aboard?

A. That is right.

Q. Did you know Captain Roberts prior to the time you called on Mr. Yeiser?

A. No; I don't know that I did, sir; I might have seen him or might have met him on a fishing boat, or something like that; but I didn't remember him; neither do I remember Mr. Mehrtens coming to me, coming to my office; I do not remember the gentleman, and I am sorry I don't.

Q. He wasn't an old friend or even a casual acquaintance of yours?

A. Who?

Q. Captain Roberts.

A. No, sir.

Q. Did you know the two nurses?

A. Yes, sir.

Q. How long had you known them before you called on Mr. Yeiser?

A. Quite a while, sir; they happened to be attached to the hospital where I was on the staff.

Q. Do you desire to change any other part of your testimony than that which you have specifically referred to?

814

A. No, I do not know that I do.

Mr. Mershon:

That is all.

Mr. Parmer:

That is all; thank you, Doctor Howell.

815 Thereupon: DR. ROBERT MILLER HARRIS

was called as a witness in behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

#### Direct Examination.

By Mr. Parmer:

Q. Doctor, what is your full name?

A. Dr. Robert Miller Harris.

Q. Where do you live?

A. At the Granada Apartments.

Q. Where is your office?

A. Huntington Building.



Q. Are you a physician licensed to practice medicine in Florida?

A. Yes.

Q. How long have you been so licensed?

A. About 13 years.

Q. Did you on March 2nd, 1936 receive a call to attend professionally Mrs. Just?

A. Yes, sir.

Q. From whom did you receive the call?

A. From Dr. Spencer Howell, of Miami.

Q. Did you receive any call from Dr. Foxworthy to do it?

A. No, sir.

Q. Now where did you go, if you did treat her, in order to do so?

A. I went over to St. Francis Hospital on Miami Beach.

Q. About what time did you go there to do it?

816 A. It was between eight and nine o'clock in the evening of March 2nd.

Q. When you arrived there whom did you see?

A. I saw the individual in charge of the floor. I later saw the patient and the patient's nurse, special nurse, in her room.

Q. Did you see Dr. Howell there at the time?

A. I didn't see him when I first arrived.

Q. Did you make an examination of Mrs. Just?

A. I did.

Q. Can you remember what you found on the examination?

A. As I recall, the general physical examination was essentially normal. I found no gross abnormalities. When I first observed her she was confined in an oxygen tent. We removed the tent and made a more or less general examination which yielded essentially normal findings. As I recall the reflexes or knee jerks practically were diminished, and there was also evidence of a little drowsi-

ness and lack of coordination and inability on the part of the patient to answer questions coherently and to follow a line of questioning in any degree of detail.

Q. Were you able solely on your examination of the patient to form any opinion as to what had caused whatever you found?

A. I couldn't definitely form an opinion.

Q. Were you appraised of the history of the case?

A. That was recorded on the chart.

Q. And that is all you know about it, what was recorded on the chart?

A. Yes, sir.

Q. And from the history were you able to state any conclusion as to what happened?

A. As I recall, my impression on the history was that the patient had probably suffered from carbon monoxide poisoning?

Q. But taking her just as you looked at her, without the history, you could not find anything definite?

A. I could find no evidence of anything specific.

Q. In general you could not tell by looking at her whether it was carbon monoxide poisoning or alcoholism?

A. I could not be sure of what the trouble was.

Q. Did you later on, after treating Mrs. Just, speak to Doctor Howell?

A. Dr. Howell came during the time that I was seeing the patient.

Q. At the time that he did come had you already given her a treatment?

A. I had.

Q. Did he talk to you about the case and what he had done?

A. Yes, he made a few remarks about the case.

Q. Did you ascertain what treatment he had already given to Mrs. Just when he brought her to the hospital?

A. That was recorded on the chart. Yes, I knew about the treatment.

818 Q. Now did you pass on whether the treatment which he had given was correct or not?

A. Well, the issue wasn't raised, as I recall it, whether the treatment was correct or not, but I saw no criticism in the treatment that had been given.

Q. Now can you recall whether the possibility was mentioned to you of alcoholism being in any way responsible for the condition?

A. I can't recall at the first time I saw the patient that the question of alcoholism was mentioned. I have a faint recollection at the moment that the question was raised or supposition was raised more as a matter of conjecture, as the way I got up, but I don't recall just exactly who raised that question, but it wasn't raised at the time that I saw her that night as far as my recollection goes.

Q. But you do remember that it was mentioned?

A. It was mentioned but I don't recall just exactly who mentioned it, whether it was Dr. Howell or whether it was one of the house-men, but I have a recollection that one would naturally wonder on something of that sort, whether such a condition might have existed.

Q. And you are not able to form an opinion whether it was alcoholism or something else on what you saw?

A. I could smell no odor, of course, of alcohol at the time I saw her, which was approximately 13 hours after the onset of the attack, and I couldn't form a  
819 definite conclusion.

Q. And in the meantime she had been in an oxygen tent?

A. Yes, for several hours and had oxygen administered as well as other treatments.

## Cross Examination.

By Mr. Mershon:

Q. Doctor Harris, when to the best of your recollection were you called by Dr. Spencer Howell and asked to see Mrs. Just?

A. I do not recall just exactly the time, but to the best of my recollection it was late in the afternoon.

Q. Did Dr. Howell then give you a case history and his idea of what was wrong with the patient?

A. I can't remember the details of it, Mr. Mershon, however, I do know that the question of carbon monoxide poisoning was suspected, because when I gained that impression and before I went there later on to see her I went by the drugstore and got an ampule of a solution which has been given to patients suffering from carbon monoxide poisoning and is supposed to be a mild antidote. That was the reason I took it over there with me, because that impression was given to me.

Q. What was that antidote?

A. Well, the solution that I have was a solution of what is known as methylene blue.

Q. Had that up to that time been recommended as an antidote?

A. It is used and it has been used certainly in the past in hospital dispensaries and First Aid Stations for carbon monoxide poisoning.

820 Q. Would you have taken that precaution if you had not been informed by Dr. Howell that a carbon monoxide poisoning condition existed and would need some curative?

A. I would not have taken it, no, sir.

Q. When you got to the hospital did you find on the hospital records that Dr. Howell had shown a history of "apparently being overcome by fumes from boat's engine"?

A. Yes, sir.

Q. Doctor, what factors enter into diagnosing a patient's condition to determine treatment to be given?

A. You mean of carbon monoxide poisoning?

Q. No. Any patient that you are called to see what are the things you do to find out the basis of your diagnosis?

A. The first important thing is to try to secure a reliable history of the illness; the second thing is to determine by as careful a physical examination as possible what abnormalities exist; the third thing is to try to corroborate the history and physical examination by suitable laboratory and, if necessary, X-ray studies. That is the correct procedure in arriving at the diagnosis.

Q. In Mrs. Just's case was the case history taken into consideration by you?

A. Yes, sir.

Q. Considering the case history and the condition which you found, including the knee reflexes, the incoherency of the patient and the drowsiness to which you referred, all of those taken together, did that cause you to confirm Dr. Howell's diagnosis of carbon monoxide poisoning?

A. I do not know that the diagnosis was actually confirmed but the existence of carbon monoxide poisoning, in view particularly of the history, was suspected.

Q. Was there anything about your examination of the patient, the symptoms that you observed, which gave you the impression that her symptoms were due to the existence of acute alcohol intoxication?

A. No, sir.

Q. What branch of the medicine do you particularly specialize in?

A. I specialize in the branch commonly known as internal medicine, which is known to the laity, I presume, as diagnoses or diagnostician.

Q. Are you called upon frequently by other physicians for consultation and to either make or confirm diagnoses?



A. Yes, I see quite a few patients in that capacity.

Q. In layman's language are you what might be termed a doctor's doctor, that is, a consultant?

A. I might be called a consultant or something like that.

Q. Would you be called a specialist in diagnoses?

A. Yes, in a rather broad sense, because the field of internal medicine is quite broad.

Q. In your practice do you treat or undertake to treat cases of alcoholism, acute or otherwise?

A. I have tried a few, but they are very distasteful to me and I dislike very much to have any connection with them, and I have had very little connection with them since a very unpleasant experience I had with one at one of the local hospitals.

Q. You have had enough experience in the treatment of these cases to recognize the symptoms?

A. I have a fair knowledge of the symptoms.

Q. Did you actually inject methylene blue in treating Mrs. Just that evening?

A. I did.

Q. Is methylene blue prescribed in the treatment of acute alcoholism?

A. No, sir.

Q. So in making that injection you were actually treating her as a patient suffering from carbon monoxide poisoning?

A. Yes, sir.

Q. Where a person has consumed so much alcohol that it has finally reached an acute stage requiring hospitalization and medical treatment, does the body become saturated with the odor of the fumes of the alcohol?

A. To a certain degree, yes.

Mr. Mershon:

That is all.

## Re-Direct Examination.

By Mr. Parmer:

Q. Well, doctor, when you say that the body becomes saturated to a certain extent, have you any opinion as to how long a time the body will remain saturated so that you can smell it?

A. I do not know the actual duration of time, but I imagine that would depend upon the amount of alcohol consumed.

Q. And also any eliminative treatment?

A. Yes, and the individual's susceptibility I would say.

Q. At the time that you saw Mrs. Just, doctor, you were looking at the then result of something which had caused that result many hours before?

A. That is right.

Q. Is it possible or was it possible, doctor, that that then result which you saw could or might have had its origin in alcoholism?

A. There was very little to be seen. As I say, in a physical examination I presume it is possible that it could have been.

Mr. Parmer:

That is all.

## Re-Cross Examination.

By Mr. Mershon:

Q. The case history showed that Mrs. Just had slept in a stateroom where admittedly the gas fumes of the motors were present, containing monoxide carbon or carbon monoxide gas in an undetermined quantity. If that were a clear, demonstrated and admitted part of the history, that she had been exposed to carbon monoxide gas in a small stateroom with the windows and door

closed, and she was brought out unconscious, and her companion, another lady sleeping in the same room, was also found unconscious and brought up in the open  
 824 air; that she had received the treatment that you found on the hospital chart prior to the time you saw her, and you found her in the condition you found her, and there was no evidence of her having a single drink of alcohol after twelve o'clock on the Sunday night before, and there was no evidence of her having done any heavy drinking, but merely having taken an average of two or three drinks of gin over a period of a couple of days before, would you under those circumstances diagnose the situation you found as carbon monoxide poisoning in view of that case history?

A. Yes, in view of the case history I think one would strongly suspect carbon monoxide poisoning.

Q. Now, doctor, when a person is knocked out or passed out from the excessive use of alcohol, during the first onset of the disease or the illness and the intervening time is the odor of alcohol on or about them?

A. It is usually very obvious.

Q. And I believe you said that a matter of 13 hours, with purgatives and oxygen tent and baths and things might to some extent extinguish that odor?

A. I think that is entirely true.

The Court:

Doctor Harris, was your giving this injection for the purpose of making a test or was it for the purpose of treatment of the case of carbon monoxide poisoning which you understood existed?

The Witness:

It was for the purpose of treating it. Unfortunately in this particular case no test of the blood was made.  
 825 That was an error of omission on the part of all of the attending physicians, of which I am a

party. There are many tests, at least three or four tests, and all of them are fairly simple—since we have investigated the matter a little bit more carefully—which show in a large percentage of cases whether carbon monoxide poison is present or not. One of the tests, a perfectly simple test, requires two or three drops of blood in a little water and a couple of acids mixed with it and so forth, but unfortunately that wasn't done. There are also tests to determine the presence and the amount of alcohol contained in the blood, and that was not done. That is a very complicated test, and that wasn't done in this particular case; and the injection that I gave her was an injection which I felt might have some slight benefit provided that carbon monoxide poisoning existed.

The Court:

You say you carried that ampule with you?

The Witness:

I got that ampule on the way over there; I stopped at the drugstore and got it.

The Court:

Was it a medication which would or would not have done any harm?

The Witness:

It wouldn't do any harm. It is given in many cases and ordinarily the patients get no reaction, but in this particular case of Mrs. Just she got a reaction to it, and I was alarmed at the moment and stopped the injection before she had received more than 50 per cent. of it, and gave her some adrenalin, which is a stimulant. I afterwards—before I left the hospital—talked to her aunt and found that she was an individual who is allergic, which means they have an idiosyncrasy to certain drugs and what not, and I felt very definitely about

this unusual reaction which she had following the small amount of this supposed antidote, and felt that it was due to this basic allergy which she had had for maybe many years.

The Court:

Did you subsequently give her the other 50%?

The Witness:

I subsequently gave her no more; I stopped it.

The Court:

When did you first learn from this aunt that she was allergic?

The Witness:

After I went out of the room.

The Court:

That same evening?

The Witness:

Yes. After she had this unusual reaction I felt that I should understand the nature of what had happened, and then the aunt said that she didn't know, of course, what it was about, but she told me that the doctors had said she was allergic to certain things.

The Court:

Is the possession of one's mental faculties incident to saying that that is a condition of being allergic?

The Witness:

No, that has nothing to do with it.

The Court:

What was the mental condition at the time you administered this methylene blue?



The Witness:

She was a little drowsy; she was yawning frequently, sort of stretching, drowsy and sleepy, and she  
827 would have to be stimulated; in other words, you would have to sort of shake her or attract her attention to get sufficient cooperation out of her so that she would answer your questions; she was in just a state of sort of drowsiness and rolling and moving in the bed.

The Court:

Now along another line: Does the presence of alcohol in the human system intensify the condition when one has inhaled certain monoxide gas, either so far as degree of suffering or being affected thereby or the ease or quickness with which one does become subject to it or the length of time that it continues?

A. I do not know sir.

The Court:

That is all I care to ask.

By Mr. Mershon:

Q. Are stimulants or sedatives regarded as the treatment for carbon monoxide poisoning in its initial stages?

A. My opinion is that practically the only thing that is of any great value in carbon monoxide poisoning is oxygen and a small amount of carbon dioxide to stimulate breathing. I don't think these other things are any good unless there is a degree of shock; I do not think the methylene blue or anything was of any value at all and probably should not have been given.

Q. What treatment is used for shock?

A. Warmth, palliatives, particularly glucose solution and salt solution, and occasionally blood trans-  
828 fusions if they are available immediately; certain stimulants, such as caffeine, camphor and such things as mutrazol.

## Re-Direct Examination.

By Mr. Parmer:

Q. The time to find out whether a person has been suffering from carbon monoxide poisoning is as close as you can get to when they came out of the place where the carbon monoxide atmosphere is found?

A. Yes, sir.

Q. That is, the nearer you get to that time the better chance you have of finding out?

A. Yes, sir.

Q. And those who were present at that time, that is, those doctors who were present at that time, were in a far better position than you ever were in this case to determine that fact?

A. Absolutely.

## Re-Cross Examination.

By Mr. Mershon:

Q. Doctor, if two young ladies were sleeping in a state-room where you knew that carbon monoxide gas had been present, and they were found there the next morning unconscious, and there was no history whatsoever of alcoholism or anything else that you could suspect that would create that condition, and you knew that carbon monoxide gas was in the room,—would you deem it necessary to make a test before treating them for carbon  
829 monoxide poisoning or would you diagnose it as carbon monoxide poisoning?

A. I would not deem it necessary, but it would seem that the weight of evidence would indicate that that was the most likely thing, however, to more or less prove the diagnosis a blood test is made.

Q. Then looking backward, doctor, and excusing the physician in charge for not making that test, wouldn't it be logical to assume that he had no reason to suspect anything but carbon monoxide poisoning?

Mr. Parmer:

I object to the question on the ground that he is asking this doctor to read the mind of another man.

The Court:

It is objected to on the ground that this witness cannot read the mind of another witness, but I think that it seeks an opinion as to which the Court should draw a conclusion rather than the witness, so I sustain the objection.

(By Mr. Mershon):

Q. Doctor Harris, if two young ladies were found in a stateroom where carbon monoxide gas was admittedly present and they were found in an unconscious condition, and the beds in which they had been sleeping were wet from urination, each of them; and each of them was found unconscious, could carbon monoxide gas cause an involuntary urination while the victim was under the influence of it?

A. Yes. Any assault which is sufficient to produce unconsciousness might cause an involuntary stool or urination.

830 Q. Would it be just as reasonable to assume that the urination by both of the victims in their respective beds was caused by the effect of carbon monoxide gas as by an overdose of alcohol?

A. Yes.

Mr. Mershon:

That is all.

(Witness excused.)

831 Thereupon: LEE B. FISHER was called as a witness in behalf of the Claimants, and having

been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Mershon:

Q. What is your full name, sir?

A. Lee B. Fisher.

Q. Where do you live, Mr. Fisher?

A. Coconut Grove.

Q. How long have you lived in Dade County?

A. Six years.

Q. What is your business?

A. Naval architect and Marine surveyor.

Q. Did you know Mr. Henry C. Yeiser in his lifetime?

A. Yes, sir.

Q. Have you had any business relations with him?

A. Yes. I sold one of his old boats for him.

Q. Do you know Captain Frederick Roberts?

A. Yes.

Q. Was he Yeiser's boat captain?

A. At the time I knew him, yes.

Q. Do you recall when Mr. Yeiser owned a yacht called the Friendship I?

A. Yes, sir. I sold that boat for him.

Q. Well, do you recall the occasion when Mr. 832 Yeiser purchased from Dr. Adams the yacht called the Amity?

A. I couldn't be positive about the date. I submitted the Amity to Mr. Yeiser.

Q. Wait a minute; do you remember the time before Mr. Yeiser ever owned the Amity?

A. Yes.

Q. Do you remember the time after Mr. Yeiser acquired the Amity?

A. Yes.

Q. What did he do about the name of the yacht Amity?

A. He changed that name after he bought the boat.

Q. What did he change it to?

A. I am trying to think of that now.

Q. Was it Friendship II?

A. I believe it was, yes. It was the same as the old boat, only he added the "II" to it.

Q. Did you make any effort to interest Mr. Yeiser in the purchase of the Friendship II at the time her name was the Amity?

A. From Dr. Adams?

Q. Yes.

A. Yes.

Q. If so state as well as you can remember your negotiations.

A. They sent me word of the type of boat they wanted.

Q. Who sent you word?

A. Captain Robert.

Q. Where did he send you word from?

833 A. He sent me word three or four days before they arrived here from the West Coast, telling me what they were looking for, and when they arrived I submitted the Amity as the boat to fill the specifications.

Q. Did you show them the boat?

A. I introduced Mr. Yeiser to Captain Archer. I was busy at the time, so I didn't stay aboard all of the time Mr. Yeiser was there.

Q. Where did you meet Mr. Yeiser and his party for the purpose of introducing them to Captain Archer?

A. At the Royal Palm Dock.

Q. Is that in Miami?

A. Yes, in Miami. She was laying there with his old boat, the Friendship I.

Q. Yeiser's boat was laying there?

A. Yes.

Q. Where was the Amity?



A. The Amity was at the City docks, so we drove to the City docks where I introduced him to Captain Archer.

Q. Did Mr. Yeiser and Captain Archer have any discussion about the Amity?

A. Yes, I heard part of the conversation, and he, as he did with all prospects that I had brought aboard the boat, enumerated the repairs that were needed on the boat.

Q. Who did that?

A. Captain Archer.

Q. Do you recall any of the things that Captain Archer said would have to be done in the way of repairs?  
834

A. Yes, he enumerated some planking in the stern and he brought up the fact that the exhaust line needed repairing, that it had been patched but it needed repairing.

Q. Captain Archer said that?

A. Yes; he gave that information to him; in fact, he gave that information to every prospect that was ever brought aboard the boat.

Q. Had you taken other prospects there?

A. Yes, I had at least six or seven prospects aboard there in the winter for the purpose of buying.

Q. Were you in any way concerned in the matter of repairs that the boat might require?

A. Well, of course in a way I was somewhat concerned because if there were too many repairs it might kill the sale of the boat, but that really had no bearing on it, because if anyone was interested in the boat those repairs were minor.

Q. Isn't it a fact that the owner of a boat always has to be doing something to it and doesn't he have to be prepared to do it?

A. There is always work on a boat in the way of upkeep.

Q. Did Mr. Yeiser purchase the Amity through you?

A. No, he didn't. You see, the boat was not purchased for sometime after that. I have forgotten the

length of time, but it was a full five weeks. I was busy at the time and couldn't stay around with him very much; in the meantime, he had met Mr. Lindstrom, a  
 835 broker, and he consummated the deal through him.

Q. Well, did you at a later date do any business for Mr. Yeiser, if so, what?

A. Well, he was a little apologetic about leaving me out on the sale, so a little later after he bought the boat he gave me an order for a very fine fishing boat.

Q. Did you consummate the sale of any boats for him?

A. Yes, I consummated the sale of his old boat, the Friendship I.

Q. Do you recall approximately when it was you sold the Friendship I?

A. I could not be positive of the date.

Q. I mean in general, the time of the year.

A. It was about five months, I should say, after he bought the Amity.

Q. Now on this occasion that you introduced Mr. Yeiser to Captain Archer on board the Friendship II at the City docks in Miami, who else do you recall, if anyone, was in the party with you and Mr. Yeiser?

A. I could not be positive about that. I remember distinctly Mr. Yeiser, of course; I concentrated on him mostly. I could not be sure whether Captain Roberts or the Chief were there or not; I could not be positive on that point.

Mr. Mershon:

That is all.

836

Cross Examination.

By Mr. Parmer:

Q. Are you able to tell from your records, sir, when it was that you first had this boat for sale?

A. The Amity?

Q. Yes.

A. Well, I think Mr. Adams and Captain Archer had informed me that the boat was for sale fully a year before Mr. Yeiser bought it. I had had several prospects aboard.

Q. You mean during that year?

A. Yes, during that year I had had several prospective buyers, but I cannot recall the exact date; I would have to go through my correspondence for that.

Q. Did you see your correspondence before you came to Court here?

A. No, I didn't look up the matter at all.

Q. How long have you known you were going to be a witness in this case?

A. The day of the subpoena is the first I knew of it.

Q. What day was that?

A. That was the 5th. I can't remember what day it was, but I think it was the 5th.

The Court:

Do you have the subpoena in your pocket?

The Witness:

Yes, I have it here. It is the 5th day of October.

(By Mr. Parmer):

Q. Well, had anyone talked to you about the matters concerning which you are testifying now before you received that subpoena?

A. No.

Q. Are you sure of that?

A. Not in this case at all.

837 Q. Had not some lawyers come down to see you to find out what you knew about the case before you got the subpoena?

A. In this case?

Q. Yes.

A. No.

Q. You say "in this case". Do you mean to distinguish between the conversation relating to this case and the conversation relating to the Friendship?

A. No. I never knew anything about this suit until the subpoena was served; I didn't know there was going to be any suit, and I had had no conversation regarding this suit at all up to the time I received the subpoena. As a matter of fact, when they served the subpoena I wasn't at home; I was out of town.

Q. You learned after you got back that someone had been down to your house with a subpoena, is that right.

A. Yes.

Q. And later on they came around and served you?

A. No, the next thing that happened was that I came up and accepted the subpoena right here.

Q. Before receiving the subpoena you came up?

A. No, I received the subpoena at home, and I came up, the day the subpoena said to be here.

Q. In other words, the subpoena was left at your house?

A. Yes.

Q. And you came home and found it and then  
838 came to Court?

A. Yes, came to Court.

Q. Up until that time you didn't know what it was all about?

A. No.

Q. You didn't know why they wanted you in Court?

A. No.

Q. You didn't know anything why they wanted you in Court until you actually walked into Court?

A. Naturally when I walked in the hall here and read the subpoena, then of course I knew what it was about.

Q. Because someone told you?

A. No.

Q. How did you know if someone didn't tell you?

A. Well, the subpoena states it.

Q. What does it state?

A. It gives the names of the parties.

Q. When did you first discuss with someone with regard to the sale of the boat Amity to Mr. Yeiser?

A. When the Friendship I landed at the Royal Palm Dock.

Q. I want to know when you discussed with any of the lawyers in the case what had taken place at the time that you introduced Mr. Yeiser to Captain Archer?

A. What had taken place?

Q. Yes; in other words, you came to Court here today to testify to what took place at that time. I want to know when you talked it over with the lawyers in the case?

A. Well, let me see. There was nothing talked  
839 over with the lawyers in the case until a long time after the boat was sold, and that talk I had with the attorneys was an entirely different matter; that was a case about a commission.

Q. I want to know if you understand my question?

A. About this case I never had any conversation with the lawyers at all until I came in Court here.

Q. You mean until you came to Court?

A. Until I came out there in the hall.

Q. And that conversation you had out there was with regard to what had taken place when you brought Mr. Yeiser over to the Amity and introduced him to Captain Archer?

A. I haven't even talked of this case with any attorneys.

Q. Do you mean to say that these attorneys put you on the witness stand and asked you questions with regard—

A. They talked to—

Q. Wait a minute. Do you mean to say that these attorneys put you on the stand without first informing you or without first asking you as to what you were going to say?



A. They certainly did not inform me what I was going to say. For your information, I made an affidavit on an entirely different case, which case was in regard to a commission, and it had no bearing on this case. I made that affidavit some months after the boat was sold, but that had nothing to do with this case.

Q. Did you ever tell the attorneys in this case just prior to your going on the stand about the conversation which took place on board the yacht Amity between Mr. Yeiser and Captain Archer?

A. Yes.

Q. When did that happen?

A. That is in the affidavit I am speaking of.

Q. When did you sign that affidavit?

A. Well, I couldn't be positive of the date.

Q. About how long ago was it?

A. Over a year ago.

Q. Were you informed at that time that your affidavit was being taken in connection with some other matter?

A. Another case entirely.

Q. Having to do with a commission for the sale of a boat?

A. With a commission on this same boat.

Q. You mean a commission on the Friendship II?

A. Yes, the Captain's commission.

Q. The Captain's commission.

A. Yes.

Q. You mean Captain Archer's commission?

A. Yes.

Q. You mean you were a witness for him in some claim that he had in connection with a commission?

A. That is right.

Q. And that matter was being handled by the lawyers who took the affidavit?

A. Yes.

Q. They were representing Captain Archer?

841 A. Yes, sir.

Q. Now at that time you say you were not informed that you were to be a witness in this case?

A. That is correct.

Q. The first you knew about it was around the 5th of the month when you got the subpoena?

A. Yes, that is right.

Q. And since that time you have not looked over your correspondence?

A. Not at all; I haven't checked up on anything.

Q. Now you say you had this boat for sale for one year and during that year you produced the various prospective buyers?

A. Yes.

Q. Were any of those prospective buyers produced by you before Christmas of 1933?

A. Well, I could not commit myself on dates, but it does not seem to me that it was that long ago.

Q. Have you any idea when the sale took place to Mr. Yeiser?

A. I should say offhand it was something more than three years ago.

Q. Do you have any idea of the month?

A. No, I have forgotten, but I can look it up. I can check it up from my files very easily because I had quite a lot of correspondence on it.

Q. Was Mr. Yeiser the last person you brought aboard?

A. Yes, he was the very last one that I brought aboard.

Q. How many did you bring aboard before that?  
842

A. I should say at least six different prospects.

Q. How long before you brought Mr. Yeiser on board the boat was it that you had brought your first client there?

A. Well, that would be pretty hard to say; I could not very well commit myself on that, but I should say offhand that I had that boat for sale a full year as I said before, these other prospects were brought aboard in the course

of a year, and Mr. Yeiser was the last prospect I brought aboard.

Q. Would you say that you had brought any prospective purchaser on board the Amity within four months before you brought Mr. Yeiser on?

A. Yes, and I think it was a shorter time than four months, because it was right in the middle of the season, and I had one or two prospects and I expect that it was not more than two months before Mr. Yeiser was brought aboard.

Q. Not more than two months?

A. That is right.

Q. Did you have others before that?

A. I had them in the course of the year.

Q. On each of those occasions did you say that Captain Archer would say to the prospective clients which were brought on board that the exhaust pipes had to be repaired?

A. Well, usually—he didn't always enumerate the repairs, and naturally I asked him to do it, because I didn't like to sell a boat that—

Q. What I am asking you, sir, is this: on each  
843 of these occasions that you brought prospects on board the Amity, which occurred before Mr. Yeiser's time, did Captain Archer refer to the exhaust pipes, and did he say they needed repairing?

A. Yes, in every instance, because it was a well-known fact that the exhaust pipes were poor and needed repairs or new exhaust pipes.

Q. Well, did Captain Archer say to the prospective clients who preceded Mr. Yeiser that the exhaust pipes needed repairs because they were leaking?

A. I don't know whether if in each instance he gave them that statement, but he made the statement that they should be renewed or repaired.

Q. Renewed or repaired?

A. Yes.

Q. And you just stated that they had been patched?

A. Well, that is renewed.

Q. Well, that means repaired?

A. Repaired, yes.

Q. It had already been repaired?

A. It had been repaired in that way, by patches, yes.

Q. Do you know when that happened?

A. I don't know when Captain Archer had that work done; I never inspected it personally.

Q. I understand that, but I want to know just what Captain Archer would say to these prospective  
844 clients of yours?

A. He simply brought to their attention the condition of the exhaust lines, that it needed repairing or renewing; that was one of the things that had to be done.

Q. What I want to know is what he said with regard to the patching which had already taken place.

A. I don't remember that.

Q. You said something about patching a moment ago.

A. Well, repairs; he said that they needed repairs.

Q. What did he say with regard to what had already been done?

A. He didn't say anything about that as far as I know or can remember.

Q. What did you mean when you said, as I recall it, a moment ago that the pipes had been patched?

A. I said they needed repairing.

Q. In other words, you do not mean to say that according to your understanding that they had been patched?

A. No, I don't remember any statement about them being patched, but he always made the statement to a client that they needed repairs or renewing; I don't know anything about patching.

Q. And that occurred during every conversation which took place between Captain Archer and any client that would bring to him?

A. That subject was always brought up, what the repairs were, if the client was interested.

Q. And those repairs always included repairs to the exhaust pipes?

A. Yes, that was the main repair as a matter of fact.

Q. You offered this boat to Mr. Yeiser for \$20,000, didn't you?

A. I believe that was the asking price; I can't recall definitely, but I believe \$20,000.00 was the asking price, subject to altering.

Q. And do you remember that Captain Roberts thereafter dealt with Mr. Lindstrom?

A. Yes.

Q. And bought it for much less?

A. I never did know just what the price was, but I know it was less, but of course that is only hearsay; I never did know positively.

Q. And you lost the sale?

A. I lost the sale which he made up for afterwards.

Q. At the time that you did lose the sale were you somewhat provoked?

A. Well, of course, slightly, but, as I said before, he apologized and gave me an order for another boat which he made up for it.

Q. Mr. Yeiser offered you his apology?

A. Yes.

Q. He said that he had not treated you right?

A. Yes; in other words, he gave me an order for the other boat on account of me losing out on the sale of the first boat.

Q. By any chance was it due to the fact that you were unable to find a purchaser?



846 A. You mean a purchaser for the old boat?

Q. Yes.

A. I suppose that helped naturally.

Q. Did you say there was considerable sentiment attached to the business that you were engaged in at that time?

A. Well, nothing to amount to anything; I just let it pass.

Mr. Parmer:

That is all.

The Court:

Do you have any more redirect?

Mr. Mershon:

Not now, your Honor.

The Court:

All right; we will adjourn until a quarter of two.

(Thereupon an adjournment was taken until 1:45 P. M. October 14, 1937).

847

October 14, 1937, 1:45 P. M.

Thereupon: LEE B. FISHER previously called as a witness in behalf of the Claimants, resumed the stand and testified further as follows:

Re-Direct Examination.

By Mr. Mershon:

Q. Mr. Fisher, on your direct examination you were asked whether you had talked about this case with the lawyers or anyone and you stated that you had not, but

that you had given a statement or an affidavit to some lawyers about a claim Captain Archer had for a commission for the sale of the Friendship II.

A. Yes.

Q. Please state to whom you gave that written statement, if you did so, concerning Captain Archer's claim for commissions.

A. Well, Captain Archer asked me if I would give a statement to his attorneys, and you were his attorney at the time, I believe; I gave it in your office.

Q. Did you come to the office of Evans, Mershon & Sawyer in the First National Bank Building with Captain Archer?

A. Yes.

Q. Did you there relate to Mr. Mehrtens substantially the things you have testified today about bringing Mr. Yeiser aboard?

848. A. I did.

Q. Did you later sign a statement which omitted those things?

A. I did.

Q. Did you during the noon hours, after you had an opportunity to examine the statement which you signed omitted the things that you told Mr. Mehrtens in his office—by the way, did you see the statement during the noon hour?

A. Well, I saw it just before the noon hour.

Q. Look at this, and see if this is the statement you signed?

A. Yes, that is my signature and that is the statement.

Q. Is that the statement to which you referred on your direct examination as being the only one you ever signed?

A. Yes, sir, being the only one I ever saw.

Mr. Mershon:

We offer this statement in evidence, if your Honor please.

Mr. Parmer:

I object to the statement.

Mr. Mershon:

If there is any objection to it, of course we won't insist upon it.

Mr. Parmer:

It is objected to upon the grounds that it is a self-serving declaration.

The Court:

Well, the objection is made that it is self-serving, and I think it would be subject to that objection. Do I understand, Mr. Mershon, that you are willing to let it go in if there is no objection?

Mr. Mershon:

Yes, your Honor.

The Court:

Well, it is subject to that objection.

849 Mr. Mershon:

My only purpose was in order to substantiate the witness' redirect testimony.

The Court:

As to the fact that he had talked with the attorneys?

Mr. Mershon:

Yes, and that this is the statement which he then gave. We will excuse Mr. Fisher, with the Court's permission.

(Witness excused).

850 WILLIAM DAMON ARCHER produced as a witness by the claimants, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Mershon:

Q. What is your full name, sir?

A. William Damon Archer.

Q. Mr. Archer, where do you live?

A. 3145 Day Avenue, Coconut Grove, Florida.

Q. What is your business?

A. Master Mariner.

Q. How long have you been connected with boats and navigation?

A. Ever since I was about nine years old; I sailed with my father.

Q. Were you born in Dade County?

A. No.

Q. How long have you lived in Dade County?

A. 47 years.

Q. How old are you?

A. 51 years.

Q. So you came to Dade County when you were about four years old?

A. Yes, about four years old.

Q. For about how many years have you been commissioned to command boats?

A. My first Master's papers were issued to me in January, 1906 or February, 1906, when I came  
851 out of the Lighthouse Service.

Q. Since that time have you been engaged as Captain of yachts and various craft?

A. Well, I would say yes except during the war, and then I was in the navigation service.

Q. You were not in command then?

A. Yes, I was.

Q. You were?

A. Yes, I was in command of a subchaser.

Q. During the war?

A. Yes, sir; and then I was taken out and put in the Intelligence Department, and after that I was just one of the "boys" ashore.

Q. Are you familiar with the yacht known as the Amity, which was at one time owned by Dr. J. H. Adams?

A. Yes, very much so.

Q. Were you Captain of that yacht?

A. I was.

Q. About how many years were you Captain of that boat?

A. I took her in December and gave her up in May—I took her in November and gave her up in May.

Q. How long was that before Henry C. Yeiser purchased it from Dr. Adams?

A. I couldn't say because I was north when he concluded the purchase of that boat.

Q. When did your contract as Captain expire?

A. In May.

Q. Was that May, 1934?

A. Yes, sir.

852 Q. Do you know whether the boat Amity had its name changed by Mr. Yeiser to Friendship II?

A. Yes, I saw the boat after her name was changed and I know it was changed because I know the boat.

Q. While you were Captain of the Amity did you have occasion to know anything about the condition of her exhaust pipes?

A. Yes, sir.

Q. Will you please tell us in your own language the condition of the pipes as you observed them while you were in command of the Amity?

A. Yes, sir. The surveyor for the Insurance Company—



Mr. Parmer:

May we have the last part of the answer precluded?

Mr. Mershon:

I will ask the Court to permit the witness to testify and if there is anything irrelevant or immaterial counsel will have an opportunity to move to strike it. The surveyor is sitting out here now.

Q. Who is the surveyor you are talking about?

A. Captain Patton.

Mr. Parmer:

My objection is that this man was asked to describe something he observed and he starts out by saying something about the surveyor.

(By Mr. Mershon):

Q. Don't tell what the surveyor told you, but just state what you found.

The Court:

I think the witness understands.

853

A. I will try to give it as best I can. When I hauled the boat out she was surveyed for the insurance company. A strut needed fixing aft, and we fixed the strut, and Captain Patton and myself went from stern to stern of that boat hunting other defects. Captain Patton went over the pipes in the boat and reported to me that they would have to be fixed.

Q. You are talking about the exhaust pipes?

A. Yes. I said "Very well". He said they would have to be fixed or replaced. I took the matter up with Dr. Adams, as he was paying the bills, and Dr. Adams said to try to repair them if possible; so I took the matter up with Mr. Knollar, of the Knollar Machine Shop, and he sent

his men in and found two places that needed repairing and repaired them.

Q. Repaired them?

A. Yes, he repaired them, and as near as I can recall one of them was a plug and the other one was a sleeve, and she was accepted by the Underwriter's agent after that, or, as near as I can figure, about the 2nd or 3rd of January. He passed the job and said it was all right.

Q. Then later did you have your attention called to the exhaust pipes or any part of them?

A. I did. My engineer told me that we were making water, and I knew her bottom was sound because she was always dry, always a dry boat, and I said, "Let's go down to the stuffing boxes, because I thought it was one of the stuffing boxes that had come loose. I went down there

and the stuffing boxes was all tight, but while  
854 fooling around we heard a trickle of water, and we located it under the floor at just about the bathroom hatch; and my engineer took a piece of tape and wrapped tape on it.

Q. What exhaust pipe was that in?

A. The port side, sir; we never had a minute's trouble with the starboard side.

Q. Was that a permanent repair you made there?

A. No, sir, temporarily.

Q. Captain, will you step over here, please. Captain, I call your attention to some copper exhaust pipes, several pieces of them, which have been introduced in evidence as Claimants' Exhibits, 1 to 6, respectively, and further call your attention to the fact that Exhibit number 1 has been identified as the starboard exhaust pipe which connects to the manifold on the starboard engine. The other remaining sections of pipe have been identified as the port exhaust pipe taken out of the Friendship II. I call your attention to a hole here appearing in the section of the exhaust pipes, Claimants' Exhibit 6, and ask you to observe the layout of the exhaust pipes and note that

Claimants' Exhibits 4 and 3 are the parts of the pipes that went out the stern. Please state if the hole which you found was in the approximate location on the Exhaust pipe, Exhibit 6, as the hole which is about  $4\frac{1}{2}$  feet from the read end of that piece of pipe?

A. Is this pipe laying now the same as it was  
855 laying in the ship?

Q. Yes, sir. ✓

A. This is the forward end and this if the aft end of the pipe (indicating)?

Q. Yes, sir.

A. Well, this piece here would come under the dining-room floor.

Q. Witness refers to the forward end of Exhibit 6.

A. Now how are these marked—1, 2 and 3?

Q. Well, Captain, the order in which they are laid is this: this one is the starboard pipe, and this (indicating) connects with it, and this section (indicating) comes right on back to that end and is then connected to this end (indicating), and then goes on out through the stern.

A. All right, as near as I can figure this is the hole that was repaired.

Q. Was there a sleeve repaired?

A. Not on the after-hole; this hole (indicating) here.

Mr. Parmer:

Referring to the hole on the forward end of Exhibit No. 6 as the after-hole.

A. (Continuing answer) The after hole that was in the exhaust pipe when Mr. Knollar fixed it.

Q. What is your recollection as to what he did to that piece?

A. It was all wrapped up so that I couldn't see exactly what he did to it; the only thing I can tell you is what they told me they did to it, and I don't think there is any

man who can tell you exactly what they did unless he stood right over them.

856 Q. What did you pay for having done to that hole?

A. I paid for repairing the exhaust pipes.

Q. What kind of a repair to that hole did you pay for?

A. Metal.

Q. Where was the forward hole that you found in the exhaust pipe?

A. The forward hole was right about in this piece here; it may have been that pet-cock as near as I can judge; that there was under the dining-room and this was just before you got to the floorboards; it was right along in here somewhere (indicating).

Q. Is that little hole about six inches from the forward end of Exhibit number 5 the forward hole?

A. Yes, sir.

Q. What kind of a repair did you make to it?

A. When I saw it this sleeve was over it and around it and it was passed by the Underwriters.

Q. Now the day that was making water and you discovered another hole in the pipe after Knollar had made these repairs, where was that hole?

A. That hole was after of the dining-room, about mid-ship of the bathroom, under what we call the hatch that we raise up.

Q. Do you recognize a hole in this pipe, Exhibit 6, in a similar location?

A. It is in a similar location to the one that I have reference to, sir.

857 Q. Captain, please state whether or not while you were in command of the Amity for Dr. Adams, if he had it put on the market for sale?

A. It was on the market for sale before I took her. When I taken the boat I was to put her in condition. When I sent my engineer into the engine-room we found every cylinder had bursted, rust had accumulated and it



had corroded the cylinders; we ordered new cylinders put in, rings and pistons. All of this had to be done to put her in A-1 shape. I think the bill was around \$3800.00 to put her in shape. Now, under my agreement with Dr. Adams if the boat was sold while I was in command, of it I was to receive a 5% commission on the sale of the boat. This was to protect me in case she was sold during the season when I could charter. Our charter agreement was that after the expenses of the charter were taken out we were to divide 50/50 the remaining proceeds of the charter.

Q. All right, do you recall having had any prospective purchasers come aboard and examine her?

A. About ten or twelve a week toward the latter part of the season.

Q. State whether or not Mr. Henry C. Yeiser came aboard for the purpose of examining her, Mr. Yeiser being the gentleman who later did purchase her?

A. I was introduced to a gentleman on board the boat as Mr. Yeiser; he was introduced to me as Mr. Yeiser. We had a talk about the boat and he asked me the condition of the boat and I told him the whole truth  
858 about the boat.

Q. Captain, what did you tell him was her condition?

A. I told him that I thought I had— on the starboard getting into Caesar's Creek and that it needed straightening; that it had a few soft planks aft that might need replacing, and he says was there anything else and I said she ought to have a new port exhaust pipe.

Q. Did you see Mr. Yeiser after that?

A. No, sir.

Q. Do you recall who came aboard with Mr. Yeiser?

A. No, sir, I wasn't introduced to them and I couldn't say who they were, but I understand it was some of the crew, but I don't know; I can't swear to it.

Q. You say someone did introduce this gentleman as Mr. Henry C. Yeiser as a prospective purchaser of the boat?



A. He said Mr. Yeiser; he didn't call no first name.

Q. Was the boat open to the inspection of the engineers or crew of the man who was interested in buying her?

A. Yes, sir.

Mr. Mershon:

That is all.

Cross Examination.

By Mr. Parmer:

Q. Now, Captain Archer, that hole that you discovered in Exhibit 6, in the port exhaust pipe—I mean the hole that you discovered after the repairs were made—just what did you do?

A. The engineer went in there and wrapped  
859 it with tape and bound it over with copper wire,  
sir.

Q. Did you see him do it?

A. I was standing up and I glanced at him once or twice; that is all; I didn't get down and help him.

Q. You saw the tape and the copper wire?

A. Oh, yes; I saw the tape after it was finished because—

Q. So you know it was tape and copper wire?

A. I know it was tape and copper wire that he put on there.

Q. Do you know when he did that?

A. Along about March, the first part of March.

Q. The first part of March?

A. Yes. I was under charter to Mr. Dick, Mr. Adolphus Dick.

Q. And the year was 1935?

A. 1934 as I recall it.

Q. 1934?

A. Yes, sir.

Q. Was that a temporary repair?

A. Yes, sir.

Q. You were operating the boat while it was under a temporary repair?

A. Yes, I had to finish my cruise.

Q. Had to do what?

A. Finish my cruise. I wasn't at a place where I could get it repaired properly.

Q. Did you come back to Miami after the cruise, was over?

860 A. Yes, sir.

Q. Did you do anything about—

A. No, sir.

Q. You understood that I was going to ask you if you did anything about making a permanent repair of this and your answer was "no"?

A. No, sir, I didn't.

Q. Was it because the repair might have been expensive?

A. Well, it was this way; if I had got a charter for it I would have had another patch put on, and being as I didn't get a charter I didn't want any more expenses than I could help.

Q. And the temporary repair that you had was good enough to last as long as you thought you might be on the boat anyway?

A. Yes, sir.

Q. You didn't know how much longer it would last but it would do you anyway?

A. I figured it was good for about 60 or 90 days.

Q. Outside of this one hole that you found there what was the condition of the exhaust pipe in general?

A. Fair.

Q. Just fair?

A. I would say fair. She had been laid up so long and the man that laid her up hadn't drained water out of that exhaust pipe; if so, she was then in good condition.

Q. But you say the general condition of that exhaust pipe was only fair?

A. That is right—fair.

861 Q. I take it that that is the reason why you recommended to Mr. Yeiser that the whole exhaust pipe should be renewed?

A. I recommended that it should be renewed, yes.

Q. I say that is the reason that you recommended it to Mr. Yeiser?

A. Because I thought it wasn't safe.

Q. Because you thought the exhaust pipe as a whole—

A. Wasn't safe.

Q. Wasn't safe?

A. It would break out again.

Q. Wasn't safe?

A. Yes, sir.

Q. Do you mean that you might have made a permanent repair to that hole which would last but the exhaust pipe in other places might break down?

A. That is it exactly.

Q. And that is what you mean by it being in fair condition?

A. Fair; it wasn't in good condition; it was just fair.

Q. It was in fair condition and by that you mean that there was a likelihood of it breaking down in other spots?

A. Yes, sir.

Q. You gained your knowledge of that by being on the vessel from November to May, I think you said?

A. Yes.

Q. At what period did you become aware that that exhaust pipe was in that fair condition?

A. When I first went aboard of her, sir.

862 Q. You made an inspection of her then, did you?

A. Yes, sir.

Q. At that time you observed that the exhaust pipe was in this fair condition but it was liable at any time to

break down in different spots; you observed that, didn't you?

A. Let's get this straight, sir.

Mr. Parmer:

Let the question be repeated so that the witness will understand it.

(Preceding question read by the Reporter as above recorded.)

A. Yes, and I reported to Dr. Adams on it that I thought the exhaust pipe would last that season but I would recommend that he replace it for the next season.

Q. I understand your recommendations, sir, but what I want to know is about your observations. I want to know whether when you went on the boat in November you observed that this exhaust pipe was in such a condition which you called fair, and at that time you understood that the exhaust pipe was in such a condition that it would break down and develop holes?

A. To answer that question I would say this: That I knew that the exhaust pipe would not last over one season; I didn't think so in my opinion. Of course I can't give an opinion on a piece of pipe—you can take a piece of pipe on board, and of course the iron rust and the salt water, and that usually forms a condition where it eats things up and—

Q. Of course, the mechanism of a vessel is  
863 subject to wear and tear?

A. Yes, sir.

Q. And it is bound to wear out at some time. I understand that.

A. Yes.

Q. Now what I want to know is whether when you went on the boat in November your opinion of this exhaust pipe, gained from your observation, was that it

might last the full season, but that there was a defect developed that might make it break out in holes before the season was ended?

A. Well, I wouldn't say that. I would say that I thought it would last the whole season and next season it would have to be renewed, yes.

Q. I believe you stated before—if not, you correct me—that you suspected that this exhaust pipe might develop holes at any time?

A. After I found that one down aft, yes, sir, but not until then; but after I found that one down aft I was careful and mighty careful; when I found that was hole then I was mighty careful and I suspected the whole pipe.

Q. You say that because you found one hole in the exhaust pipe you suspected the whole pipe?

A. Yes, sir, the whole pipe because you can never tell where they will break out the second time and when.

Q. Hadn't you already found two holes in the exhaust pipe?

A. Yes, sir.

Q. You had repaired them?

A. Yes, sir, up forward there.

Q. Up forward?

864 A. Yes, sir.

Q. After you found these did you suspect the whole exhaust pipe?

A. No, sir, because I sent my engineer in there with a hammer to tap that exhaust pipe to find weak spots.

Q. You did?

A. Yes, sir.

Q. I want to understand you. When you found a hole or holes in an exhaust pipe such as we are dealing with here, do you suspect that there is something dangerous with regard to the pipe as a whole?

A. Nothing dangerous except to—



Q. I meant to say this: When you find two holes in an exhaust pipe like that do you suspect the condition of the rest of it?

A. That is the reason that I recommended to Dr. Adams to renew the pipe.

Q. When you found these two holes which you had repaired at Mr. Knollar's you say that you did suspect then the condition of the pipe as a whole?

A. Why, certainly; it is the same with anything an automobile or anything.

Q. What did you suspect with regard to it?

A. I didn't know where she was liable to break out.

Q. Did you make any test of it to find out whether it was as a matter of fact weak?

A. No, sir, I didn't; I sent the engineer under  
865 there to make the inspection.

Q. You sent him under?

A. Yes.

Q. What did he report to you?

A. He reported that she was solid.

Q. That she was solid?

A. After that second hole.

Q. You say you sent him down after this hole had developed at the other end?

A. No, sir.

Q. All right, what time?

A. After Mr. Knollar had patched the two holes at his place, then I sent the engineer down to tap that line to see if we had any more holes needing repairing, and he reported that she was solid and didn't need no repairs.

Q. There were no other holes that he could find?

A. No other holes.

Q. Did you conclude from that that the pipe was in good condition?

A. That it was in fair condition and would last the season out.

Q. What do you mean by fair condition?

A. Fair condition is that she would not be required to be renewed that season.

Q. What tests did you say you had your engineer perform to indicate that that pipe was in fair condition?

A. I will liken that to an automobile tire.

Q. All right.

866 A. You might say an automobile tire is worn but it is in fair condition. You might say "it will run me 2000 miles more", and it might go 6000 miles and then she blows out.

Q. Well, did the engineer report anything to you from which you gathered that the pipe was only in fair condition?

A. He reported to me that she was solid; that the pipe has got two holes in it, so you couldn't call that good condition.

Q. The pipe had two holes in it at the time which had been repaired?

A. Yes, sir.

Q. What did the engineer report to you with regard to the rest of the pipe which indicated to you that the pipe was only in fair condition?

A. He told me that he had found no more soft spots in it; that he had tapped it down the line and that she was in fair condition.

Q. In fair condition?

A. Yes, sir.

Q. And by fair condition you have already stated that you understood that there was a likelihood that the pipe would last the rest of the season and would not last longer?

A. That is what I figured, yes, sir; I might have been wrong but that was my opinion.

Q. That is what you understood?

A. Yes, sir.

867 Q. And this testing of the pipe by your engineer took place just after Knollan completed the job?

A. Just after Mr. Knollar completed the job, yes.

Q. And Mr. Knollar completed the job when?

A. The latter part of December, because the Insurance Adjuster came aboard just after New Year's and examined the patches and passed on them and examined the exhaust pipes and passed them.

Q. A pipe which is only going to last the rest of the season, such as this one, and which will not last longer, is it thinner than other pipes; is that the reason?

A. I can't tell you because I am not an engineer or pipe-man, but I know this: that a piece of pipe in a boat—that one piece will spring a leak and the other piece will be good for years, especially a pipe that water runs through.

Q. I want you to explain what you understood when you formed the opinion that this pipe was in fair condition. That is what I want to know. Did you intend by that that the pipe was only in fair condition and would not last as long as another one because it was worn and thinner than originally?

A. Why certainly.

Q. That is what you intended?

A. Well, it was worn thinner in spots I will say.

Q. All right.

A. Yes, sir.

Q. You were fully aware of that in January?

A. Yes, in January.

Q. Throughout the month of January you  
868 were fully aware of that, were you not?

A. I was aware of it; that the pipe had been repaired and I thought that it was safe to put passengers on that boat; if not, I would not have put them on there.

Q. That is another matter. I asked you whether you were fully aware throughout the month of January that this pipe was in that fair condition which you have described?

A. I thought it and I still say I thought it was in fair condition; I don't say it was in good condition but it was in fair condition.

Q. But have no mistake about it, sir—by fair condition you understood that the pipe was somewhat worn and thinner?

A. It was bound to be.

Q. That is what you understood?

A. You leave any pipe for months and—you understand that.

Q. Never mind what I understand. That is what you understood?

A. Sure.

Mr. Mershon:

The witness has not finished his answer before he was interrupted.

The Court:

Read the question.

(Thereupon the preceding question was read by the Reporter as above recorded.)

The Court:

Have you finished your answer?

The Witness:

I think so, yes.

The Court:

You may proceed.

(By Mr. Parmer):

Q. Now were you always careful, Captain Archer, to tell other purchasers—I mean other than Mr. Yeiser—about the condition of the exhaust pipes as you knew them to be or understood them to be?



A. If they asked me, yes. If anyone asked me about the condition of the boat I would tell them the truth about it.

Q. Do you mean that they would have to come out and say, "How are the exhaust pipes?"

A. No, but if they asked me did I know if there was anything else wrong with the boat I would tell them.

Q. And you think that is right, do you not?

A. I certainly do.

Q. Well, now if a person would come around and say "What is the condition of this boat?", would you start from the top and go to the bottom and tell him all of the things that were wrong with the boat, and included in that you would have the exhaust pipes?

A. The way the question was brought up was: he was asking me about the boat and I told him that the boat was the smoothest running boat I was ever on; that it was the easiest handled boat I was ever on for a houseboat, that there was absolutely no vibration in the engines at all, and "I know that anyone buying her will get their money's worth." The question was then put to me: Is there anything wrong with this boat that you know of, and I had to say, just as I told him, what I thought was wrong.

Q. Did you say that in dealing with a prospective purchaser of that vessel at the time that you  
870 were having these various prospective purchasers on that boat, that is, that it was only when they asked the specific question "Is there anything wrong with the boat?", that you told them about the exhaust pipes?

A. Yes, because if they didn't ask me whether there was anything wrong with them, why I wouldn't never say a word.

Q. That is good salesmanship?



A. No, it is not good salesmanship; it is just keeping quiet.

Q. Of course if they did ask you then you would always tell them?

A. I would have to, because they would find it out later.

Q. At the same time you would not, in dealing with any of the other purchasers, mislead them in describing the condition of the exhaust pipes, would you?

A. Absolutely not.

Q. Then you would not tell them something with regard to the exhaust pipes and then leave out what you understood to be the real condition of them?

A. Certainly not.

Q. If you did that you would be very much surprised to know it, would you?

A. If I had done that?

Q. Yes.

A. Left out anything?

Q. Yes.

Q. Captain Archer, is that your signature?

871 A. I will tell you in a second.

Q. I asked you if that was your signature?

A. Yes, that is my signature as near as I can judge. I do that kind of writing. I am no expert but I think it is.

Q. Well, do you remember, Captain Archer, on January 27, 1934, writing a letter to William ..... in New York with regard to the sale or proposed sale of the yacht Amity?

A. No, I dictated it to a stenographer.

Q. Do you remember sending out that letter to a number of brokers?

A. I did.

Q. And in those letters you endeavored to describe the vessel?

A. Yes, sir.

Q. And in that letter you explained—

A. I said that the boat was in good condition, that the engine had been overhauled.

Q. And in endeavoring to describe the vessel you endeavored to set forth the facts as you understood them to be?

A. Certainly.

Q. And without withholding from them pertinent information?

A. I might not have went into details about certain little things but I gave them the gist of the whole thing.

Q. But you did not seek to withhold from these brokers and prospective purchasers information which was of some importance to them?

A. Not that I know of, sir.

Q. Now in regard to the *Amity* do you remember that you stated on January 27, 1934, in that letter, "She is in better condition at the present time than at any other time"—

872 Mr. Mershon:

We object to that, Your Honor, on the ground that it is an attempt to read into the record a letter which has not been put in evidence.

Mr. Parmer:

I expect to offer this letter later. At the present time I am testing the recollection of this witness on cross-examination. That is what I am doing now, and I will identify the letter later.

The Court:

You can offer the letter in evidence.

Mr. Mershon:

He can ask him if he wrote it and then offer it in evidence.

(Legal discussion off the record.)

The Court:

I don't think he can offer it in evidence on cross-examination.

Mr. Mershon:

We have no objection to filing the letter in evidence after the witness identifies it, even on cross-examination.

The Court:

It is up to Mr. Parmer as to whether he wants to pursue that course.

(By Mr. Parmer):

Q. Look at that letter and tell us whether you wrote it. Just answer the question.

The Court:

Did you write that letter?

A. Well, sir, no. I told my wife the condition of this boat and I asked her to write a letter to all of the brokers and she did it herself.

873 The Court:

Did she sign that letter?

The Witness:

I think that is her signature, instead of mine on that letter; she has a right to sign my signature, because I gave her that privilege.

Q. Were you aware of that when I showed you the signature for the first time?

A. I knew it was W. D. Archer you understand and that is my signature, W. D. Archer.

Q. Didn't you say that that looked like your handwriting?

A. Yes, but now that I have seen it again I don't think that is my handwriting; that looks more like my wife's writing. I can sign my name in a minute and you can tell in a minute if you desire.

Q. Well, Captain Archer, do you really say that this is not your signature?

A. I wouldn't swear it wasn't my signature but I don't think it is; I think my wife wrote it, and it looks more like her's than mine.

Q. Let's get to it from another viewpoint. Did your wife typewrite these letters?

A. Yes, sir.

Q. Your wife can handle a typewriter?

A. Oh, yes; she is the head of the Commercial Department at the Ponce de Leon.

Q. Are you in business yourself?

A. No, sir; I am nothing but a sea captain out of a job. I have been sick for the last 18 months  
874 and that is the reason I haven't been on a boat.

Q. Was your wife familiar with this boat?

A. Yes, she knew this boat from A to Z.

Q. Had she travelled on it?

A. No, but she was aboard it many, many times. During the Christmas holidays she was over there every day for lunch with me.

Q. Did she know how long the gig was?

A. I told her told.

Q. How long did you tell her it was?

A. About 13 feet or something like that.

Q. You told her a lot of the things from which she composed this letter?

A. Certainly, but as far as putting the letter into type I never did that. I just tell her the things I want written and she writes it.

Q. You signed some of these letters yourself, didn't you?

A. I don't remember whether I did or not. I might have signed some of them and she might have signed the whole bunch.

Q. Now with regard to the exhaust pipes, you told her what to say about them?

A. I told her to say that the exhaust pipe was in good condition as far as I can recall; I don't remember exactly the words I told her.

Q. Did you tell her to say that the exhaust pipes were of exceedingly heavy copper?

875 A. Not that I know of, but the tanks were of exceedingly heavy copper.

Q. I am asking you about the exhaust pipes?

A. No, sir.

Q. Did you tell her to put in the letter that they were of exceedingly heavy copper?

A. Mister, I don't think so, but I can't remember that far back.

Q. Is it possible that you may have had the idea in your head in January of 1934 that the exhaust pipes on the Friendship II were of exceedingly heavy copper?

A. I couldn't have because I know they didn't or wasn't.

Q. You have read this letter now?

A. I have.

Q. You say that phrase used in that letter, did you not, with regard to the exhaust pipes on the Friendship II?

A. As near as I can recall by reading that letter it says "new exhaust pipes", and there was no new ones put in.

Q. Were those statements contained in that letter which you have just read true on January 27, 1934?

A. Except the statement about her exhaust pipes, and I know they were in good shape. The reason—the rest of that was all true as near as I know.



Q. Now would you mind writing your name for me with a pen?

A. I will be glad to. (Witness complies.) I will write that again because that "D" is bad. Now that  
876 is my signature.

Mr. Parmer:

Now, may we have both marked in evidence, first the letter?

Mr. Mershon:

No objection.

The Court:

You have no objection to them being offered in evidence on cross-examination?

Mr. Mershon:

No, Your Honor.

The Court:

All right; let them be filed in evidence.

(Thereupon the letter and sample of signature of the witness were marked as Petitioner's Exhibits 7 and 8.)

Q. What is your wife's first name?

A. Sue.

Q. Sue?

A. Susan.

Q. Have you ever dictated any letters?

A. Very few.

Q. Have you observed in those letters that you have dictated that in the lower lefthand corner it is customary to make a notation as to who dictates it and who types it?

A. Yes, I have seen that on other letters, but I don't

think it was ever on mine when Sue and I wrote them together.

Q. Do you notice this symbol in the lower lefthand corner of this letter "WBA"?

A. Yes.

Q. By "N". Who is "N"?

A. Susan Norwood Archer, my wife.

877 Q. That is the symbol that stood for the person who took the dictation?

A. It refers to the one who wrote the letter.

Q. You were the one who dictated it?

A. I just told her the gist of it. I never did much letter writing, and she would always revise them.

Q. Do you say that you didn't tell her to put in the letter that the exhaust line was of exceedingly heavy copper, but that she made that up herself?

A. No, I don't say that. I would say this: That when we were talking about the tanks and she asked me about the tanks I said "exceedingly heavy copper", and I told her that the exhaust line was in good condition.

Q. Did you tell her it was in good condition?

A. I told her that it was in good condition, and I told everybody it was in good condition.

Q. In January?

A. Yes, because she had just been repaired.

Q. Did you tell your wife to put in this letter that she was in good condition?

A. I can't remember that far back telling her what to put in any letter, and I don't believe you can tell me what you put in your letters that far back either.

Q. In other words, you don't remember now how it came about that in this letter the statement is contained, "The exhaust line is of exceedingly heavy copper?"

878

A. No, I do not.

Q. And it might be, for all you remember about it, that that is what you told your wife to put in the letter?

A. It might be but I don't think it was.

Q. Well, now, will you tell us when you were first asked to be a witness in this case?

A. I will be glad to. I don't think I have anything to hide at all.

Q. I don't want you to feel that way, sir.

A. Mr. Mershon asked me—Mr. Mehrtens asked me, was I the captain of the Amity and I told him yes. I can't tell you the date.

Q. About how many months ago?

A. Quite early. I couldn't tell you that.

Q. Was it a year ago?

A. Not a year; I don't think it has been a year.

Q. At the time that he asked you was your memory clear on the events concerning which you have testified here?

A. No, they were not.

Q. What part of the things that you have testified to today could you remember at the time when Mr. Mehrtens first approached you?

A. Practically all of it, but there were quite a few things that I had to refresh my memory on.

Q. What things?

A. I didn't know whether Mr. Knoller had put  
879 in a plug or whether he had put in a sleeve.

I couldn't remember and naturally I went over to see what it was, and when I went to Mr. Knoller I asked him. I can remember things like that. If you can you have more brains than I have, because I can't remember such things.

Q. Now tell me, Captain Archer, a boat has a lot of pipes on it, doesn't it?

A. Yes, sir.

Q. Pipes for water and pipes for exhaust?

A. Yes, all kinds of pipes, gas pipes, garbage pipes, drain pipes from the sink and just all kinds of pipes.

Q. Captain Archer, you say that Mr. Yeiser came on board the Amity as it was then and he was accompanied by some of the crew?

A. No, sir.

Q. Didn't you say that on direct-examination?

A. No, sir; I said there were two other fellows there; I don't know who they were, and he had never met his crew at that time.

Q. There were two other fellows there?

A. Yes, but I don't know who they were. I had never seen Mr. Yeiser before and I never saw him since, and I wouldn't know the man if I saw him today.

Q. Do you know Mr. Lindstrom?

A. Yes, sir.

Q. Don't you remember that he was there?

A. Mr. Lindstrom was never aboard with Mr. Yeiser that I know about. He might have been  
880 and I didn't know it was Mr. Yeiser.

Q. Somebody introduced Mr. Yeiser to you; didn't they?

A. Yes.

Q. Who was that?

A. Mr. Fisher.

Mr. Parmer:  
That is all.

Mr. Mershon:  
The claimants now rest, concluding their rebuttal testimony.

881 Thereupon: CAPTAIN FREDERICK ROBERTS  
was recalled by the Petitioner, and having been  
previously sworn, testified further as follows:

Direct Examination.

By Mr. Parmer:

Q. Captain Roberts, were you present in Miami at  
or about the time when it was contemplated purchasing  
the Amity?

A. Yes, sir.

Q. Who had charge of the purchase of that vessel?

A. I did.

Q. In what way?

A. Well, in paying the money for it.

Q. Did you have anything to do with it before the  
money was paid?

A. Well, I just don't know what you mean by that,  
but I was to look the boat over with some broker by  
the name of Mr. Lindstrom, and he gave me the idea  
that the boat was a fine boat and she looked good to  
me and she was good.

Q. Did you talk to Mr. Fisher at any time with re-  
gard to the purchase of the Amity?

A. Mr. Fisher talked to me.

Q. At the time that you talked to him had you had  
under consideration already the purchase of the Amity  
or did that come from Fisher?

A. Mr. Fisher came down and recommended the boat  
to me. You know he is a broker or is supposed  
882 to be and he said that he heard we were in  
the market for a boat.

Q. At the time that Mr. Fisher came to see you had  
you heard from any other broker with regard to the  
Amity?

A. Yes—no, sir.



Q. Did you thereafter hear from any other broker with regard to the Amity?

A. No, I didn't fool with any broker. We had a little talk down at the Royal Palm Dock and I asked him what the Amity was and he told me that the Amity was a good little boat—

Q. Don't go into that. I want to know who you dealt with in negotiating the purchase of the Amity?

A. I dealt with Captain Lindstrom.

Q. Did you deal at all with Mr. Fisher after he saw you?

A. No, sir.

Q. Was Mr. Yeiser on the Friendship I at the time?

A. Yes, sir.

Q. Did you at any time go on board the Amity?

A. No, I went aboard with Mr. Yeiser and Captain Lindstrom.

Q. At that time did you inspect the boat?

A. Yes, we went through it. The boat had been laid up and naturally you would know we would have to do a lot of work.

Q. Did you see Captain Archer on the boat at the time?

A. No, sir.

Q. Who showed you through the boat?

A. Captain Lindstrom.

Q. At that time were you acquainted with  
883 the movements of Mr. Yeiser, if so, to what extent?

A. In every way, in his business and in the business on the boats.

Q. Were you acquainted with the callers that he had who came on board the boat to see him?

A. Not all of his callers, no.

Q. Were you acquainted with the times when he went ashore?

A. Pretty close to it, yes.

Q. Well now do you know at that time when he went ashore and when people came to visit him?

A. He didn't go ashore; he had been sick and we had a nurse with him; he had been wanting to go and look at that boat, but he wasn't able to go at that time, but they did take him out walking before he was able to go and look at that boat.

Q. That is what boat you took him to see?

A. I taken him up to see a little boat by the name of Coconut and then we went up and looked at the Amity.

Q. On the same day?

A. Yes.

Q. Do you know whether he was ashore on any other occasion before that when he went to look at the Amity?

A. You can rest pretty sure that he wasn't, because he wasn't able.

Mr. Parmer:  
That is all.

Mr. Mershon:  
No questions.

884        Thereupon CAPTAIN J. N. PATTON was recalled by the Petitioner and testified further as follows:

By Mr. Parmer:

Q. Captain Patton, the spring of 1934 were you acquainted with the vessel Amity which afterwards became the Friendship?

A. I made a survey of her in the fall of 1933.

Q. What did you find as a result of that survey?

Mr. Mershon:

We object to the witness referring to that paper unless it is necessary to refresh his memory.

Q. Tell me, Captain Patton, is it necessary for you to refer to this paper in order to refresh your memory?

A. If you want the whole situation as to what I found wrong with it, this is a copy of my report to the insurance company.

Q. Did you make that survey at that time in connection with an inspection for the insurance company?

A. Yes, sir, and here is my report, the whole business. (Witness reads report dated December 9, 1933, as follows):

Q. Do you mean to say that you personally  
885       ascertained that that work was done at the time  
          you made that report?

A. Yes, and this is my report to my company to that effect.

Q. Did you make any survey thereafter of the Amity?

A. Yes. She struck a log and I was called to Fort Meyers to look at the repairs to the bottom and the struts, and while there we found some planking right over the propellers that was rotten inside on account of the ballast and they were renewed at that time.

Q. When was that?

A. That was the spring of 1934.

Q. Did you make any inspection of the exhaust pipes at that time to see whether the work had been done?

A. No, sir; this inspection was on account of the bottom damage.

Q. Did you make any other surveys of the vessel after the one in December?

A. No, not for full coverage, that is, to go all over the boat.

Q. After the repairs were made in Knoller's yard did you examine the rest of the exhaust pipes to see what condition they were in?

A. I had examined them before when it was reported that they were bad, and the only thing I found was two holes.

Q. Besides those two holes what was their condition?

A. The pipe leaked all right from the outside.

Q. Did you put it down as a good risk?

A. After it was fixed.

Q. Did you ever learn of any other trouble  
886 with respect to exhaust pipes thereafter?

A. Not until yesterday when one of the boys out there told me that he discovered a small hole at a later date under the stateroom, but that wasn't visible when I looked over the boat?

Q. That was in December, 1933?

A. Yes.

Q. Would you say that in December, 1933, and January of 1934 are the only times that you went on board the vessel to make a survey?

A. Yes, but in 1934 I was on board on a damage job.

Q. In 1934 it was just a damage job?

A. Yes, sir.

Q. To find out the extent of the damage and to report it to the insurance company?

A. Yes.

Q. At that time you did not make any survey of the pipes?

A. No sir.

By Mr. Mershon:

Q. Captain, will you let me see the report which you read covering your survey made in December, 1933?

A. (Produces paper.)

Q. This letter from which you read is dated January 3, 1934, and that refers to your recommendations of De-

cember 9, 1933. Do you have your recommendations of December 9, 1933, there?

887 A. No, I do not have them with me.

Q. Where is the copy of that letter?

A. I do not know.

Q. Do you have it in your records?

A. I looked all over for it last night. When I check up on a boat for an insurance company I fill in a rough copy like this and make the recommendations on the back.

Q. May I see that?

A. Yes, but I doubt if you can read it. Here is a letter that might have some bearing on it.

Q. I am asking you particularly about the list of recommendations as part of your survey of December 9, 1933. I am asking you if in that letter of January 3, 1934, where you referred to the date of December 9, 1933, you meant that your recommendations were made on December 9, 1933, or that you made your survey on December 9, 1933?

A. I made my survey and recommendations on the same day.

Q. Did you send those recommendations off in the form of a letter?

A. Yes.

Q. Have you made any effort to procure that original letter or a copy of it?

A. I didn't know anything about it. I wasn't called on this case until yesterday.

Q. Do you mean to say that this case had not been discussed with you until yesterday?

888 A. Not until day before yesterday.

Q. Did Mr. Coleman, of Loftin, Stokes & Caulkins, confer with you at any time prior to yesterday concerning the survey that you made of that boat or what it showed?

A. No, sir.



Q. When was the first time Mr. Coleman or Mr. Parmer or any other lawyers or persons talked to you about the survey you made of that boat on December 9, 1933?

A. I think it was you who first spoke to me in your office. I don't remember the date but it was some months ago.

Q. Who else?

A. Nobody until I was called in to measure that cabin.

Q. And that was yesterday?

A. Yes, sir.

Q. Have you been subpoenaed in this case?

A. No, sir.

Q. Having testified that you talked to me—you talked to no one else—

A. No lawyers. I talked around the docks and listened around the docks, and that is all I know about it. When an insurance company sends me aboard to check up a boat for insurance purposes that which is in that yellow paper is what that want, they want to know what is wrong with the boat.

Q. Now I would like to have that yellow paper which read into the record marked for identification purposes.

A. I want that copy; that is the only record  
889 I have for my file.

Q. We will take care of that. We will mark it Claimants' Ex. 13.

(Witness ~~excused~~.)

890 Mr. Mershon:

The claimants jointly and severally move to strike the testimony of the witness, Seth Stetson Walker, the chemist, as to the amount of carbon monoxide gas which his analysis showed was in the specimen which he testified was taken through a tube from the floor of the double after-cabin after the motors had been run two hours or more in connection with the tests made upon

the yacht, Friendship II, in August, 1936, at Fort Meyers, Florida, upon the following grounds:

First, said testimony is incompetent; second, it is irrelevant and immaterial; third, it has no probative value; fourth, the conditions under which the alleged tests were made are not similar to and omitted many important factors existing in the situation in, about and upon the yacht Friendship II on the night of March 1st and the morning of March 2nd, 1936, when the claimants received their injuries. More particularly said dissimilarity being, among other things, as follows:

(a) It affirmatively appears from the undisputed evidence that the yacht Friendship II had been operated with her motors running, with the windows closed and the outside hatches and ports closed for two hours or more on the evening of March 1, 1936, up to about 9:00 P. M. and that thereafter, about 7:00 o'clock A. M., the motors operated for an additional hour and a half to an hour and fifty minutes while the boat was in motion before the young ladies were discovered, so that the carbon monoxide forced into the stateroom by the operation of the motors from 7:00 o'clock A. M. was in addition to such carbon monoxide gas as it has been demonstrated would be forced into the stateroom in the operation of the  
891 boat from about 7:00 P. M. to 9:00 P. M. on March 1st, whereas the alleged tests taken at Fort Meyers involved the operation of the motors for a single period of two hours to two hours and twenty minutes, as the case may be, beginning with the bilge free and clear of all gases at a time when the motors had not been previously operated for three or four days.

(b) In the test taken at Fort Meyers there is no evidence of any head wind or any other wind which would affect the storage or the amount of the gases in the bilge

of the yacht, whereas it has been shown that on the night of March 1st and the morning of March 2nd, 1936, there was a head wind blowing against the vessel which, with the motion of the vessel in the opposite direction, may have been and was a factor in the collection of gases in the after stateroom from the bilge of the vessel.

(c) In the tests taken at Fort Meyers no consideration was given nor effort made to include in said tests the small hole upon the forward part of the port exhaust pipe, Exhibit No. 6, which was found in said pipe by the witness Roderick on the day of March 2, 1936.

(d) That in the tests made at Fort Meyers conditions were not similar to the conditions existing in said stateroom from which the injured claimants were taken on the morning of March 2nd, in that no allowance was made for the cubicle content displacement in the stateroom of the bodies of the two claimants, nor was there  
892 taken into consideration the fact that the claimants themselves had breathed the oxygen in the air in the stateroom at the time that they were injured, leaving more room in the atmosphere of said cabin by the absence of oxygen for the injection of carbon monoxide gas than existed at the time the tests were made at Fort Meyers.

(e) It affirmatively appears that the tube which was placed in the stateroom at Fort Meyers, and through which the specimen of air was drawn from the after-stateroom for the purpose of analysis, was resting on the floor of said stateroom, whereas at and prior to the injury of the claimants in said stateroom the heads of the respective claimants were near the ceiling while they were standing and were on the bunks or beds several feet above the floor when they were found, and were nearer to a heavier mixture of said carbon monoxide gas in said stateroom.

due to the fact, of which the Court will take judicial notice, that carbon monoxide gas is lighter than air and tends to rise and gather toward the ceiling of the stateroom.

(f) The evidence of the dimensions upon which said chemist, Seth Stetson Walker, based his percentage of carbon monoxide, that is to say, the alleged cubicle content of the stateroom upon which the chemist's said result is based, were and are incorrect and not the true dimensions of said stateroom, and the cubicle content used by said chemist has been admitted as not being the cubicle content of said stateroom at the time and place  
893 when the claimants were injured. It does not appear from the testimony concerning such tests upon which said chemist's result is based that the specimen of air or mixture of atmosphere taken from said stateroom or analyzed by said chemist was a true specimen of the atmosphere in said stateroom.

(g) It affirmatively appears from the testimony of the witnesses for the petitioner that there is a direct conflict as to the time for which the motors of the vessel were run and operated in connection with the test of the air inside of said stateroom.

(h) It wholly fails to appear that the physical conditions and the other portions of said boat were the same when the test was made as such conditions existed at the time claimants received their said injuries.

It does not appear that the climatic conditions when said test was made were similar to the climatic conditions existing at the time the claimants were exposed to said carbon monoxide gas and received their injuries.

(i) It affirmatively appears that when the test was made the door opening from the bathroom was a solid

door, with no ventilation into said stateroom, and that said door was closed so as to keep out of said stateroom the gas and fumes coming from the bilge into the bathroom and coming from the bilge through the opening in the bathroom hatch into said bathroom, whereas at the time

894 the claimants were exposed to said gas and received their said injuries, said bathroom door was open and the fumes from said bilge had access into the bathroom through the hole in the bathroom hatch and the vents in the bathroom wall, and thence into the stateroom in which claimants were found.

(j) It has not been shown that the presence of carbon monoxide gas in said stateroom would be in similar quantities and of similar effect where the motors were operated while the vessel was moored alongside the shore as when the motors were running and the vessel moving through the water.

The Court:

We will take an adjournment until tomorrow morning at 10:00 o'clock.

(Thereupon adjournment was taken to 10:00 A. M., October 15, 1937.)

895 Miami, Florida, October 15, 1937—10:00 A. M.

Met pursuant to adjournment.

Appearances same as heretofore noted.

Mr. Parmer:

I would like to answer the motion that was made last night.



The Court:

It does not require any argument.

Mr. Parmer:

May we put on the record certain agreements or stipulations that I have made with Mr. Mayne with regard to the St. Louis testimony.

The Court:

All right.

Mr. Parmer:

With regard to Mrs. Just I believe it is agreed that the nurse in Chicago testified that Mrs. Just showed a disinclination to talk with her relatives or talk when her relatives were present; that she showed a greater inclination to talk when only the nurse was present, and she showed a still great disinclination to talk and converse when next-door neighbors were present. Do we agree to that?

Mr. Mayne:

That is correct, except by adding that the nurse was trying to enter into conversations when she was with her as a part of her care and treatment.

Mr. Parmer:

All right. Also in the testimony of Mrs. Gross, who was Mrs. Just' mother, that she knew that Mrs. Just knew Mr. McKay socially, but Mrs. Just had never told her that she had gone on excursions on the yacht  
896 Friendship II alone with Mr. McKay.

Mr. Mayne:

That is correct.

Mr. Parmer:

Now with regard to Miss Gruner. That prior to going on the boat she had been under the care of a physician, Dr. Rush, and that when she returned in March she did not obtain any medical treatment from any doctor until May, 1936, when she went to a physician who had been treating her prior to her going on the Friendship II?

Mr. Mayne:

That is correct.

Mr. Parmer:

And that that summer of 1936 she went on a visit to Michigan, to the place she had been accustomed to going in years before she went on the Friendship II.

Mr. Mayne:

And that the father and mother of Miss Grunow said that she had to go away in order to quiet her nerves.

Mr. Parmer:

Very good.

Mr. Mayne:

All right.

Mr. Parmer:

That she is not a person who has ever worked for a living, except that during the Christmas holidays prior to coming to Florida in 1935 she worked during the Christmas holiday season in a jewelry store as a clerk.

Mr. Mayne:

That is correct.

Mr. Parmer:

Dr. Kells is here and I would like to put him on at this time.

The Court:

All right.

897        Thereupon DR. PAUL KELLS was called as a witness on behalf of the petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Parmer:

Q. What is your full name, Doctor?

A. Dr. Paul Kells.

Q. Where do you live Dr. Kells?

A. In Miami.

Q. Where is your office?

A. It is in the Ingraham Building.

Q. Are you licensed to practice medicine in Florida?

A. Yes, I am.

Q. And for how long have you been so licensed?

A. For nearly four years; it will be four years in December.

Q. What has been your medical training?

A. Graduate of the University of Virginia Medical School in 1930, one year medical internship, which was followed by two years as Resident on the Neurology and Psychiatric Service at the University of Virginia Hospital.

Q. Since you have been in private practice have you engaged in any specialty?

A. I have engaged in the specialty of neurology and psychiatry.

Q. Here in Miami?

A. Yes.

Q. In connection with your specialization have  
898 you been associated with any hospitals?

A. As a member of the Staff of Jackson Memorial Hospital and St. Francis Hospital.

Q. Now, Dr. Kells, I want you to assume as true certain facts that I am going to give you, and then I want to ask your opinion. Now I want you to assume that a young lady about twenty-four years of age, who had been an only child and who had been married and divorced, and who had had a child by that marriage, came to Miami in the fall of 1935 and was acquainted and became more acquainted with a man who was then married but separated from his wife, and that even at that time she expressed fear that her former husband might in some way regain the custody of the child which she had previously been awarded by the decree of divorce, and that while in Miami and in association with this man she went on several occasions with him on a private yacht, and the two went on excursions on such yacht, and that she did not tell her mother about such excursions; that on February 28, 1936, she went with this same man, accompanied also at that time by the owner of the vessel and another young lady, who was a friend of the young lady whom I mentioned in the first place; that the vessel left Miami on February 28, which was a Friday, and was gone down the Bay Saturday and Sunday and returned to Miami on Monday morning; that during the time that the boat was away some liquor was consumed by all the members of the party; and that on Monday morning, the vessel having proceeded from its anchorage in the Bay at about ten minutes of seven in the morning, the aforesaid  
899 young lady was found in her bed and failed to arouse when called; that she was then taken from her bed and brought up on deck, and it was found that when she was taken from her bed that the sheets and bedding were wet, and that the total period from ten

minutes of seven, when the boat left its anchorage, until the woman or young lady, I should say, was removed from the bed was not over an hour and a half; that after she was removed to a place of rest on the upper deck of the vessel a doctor was called who gave her an injection of caffeine and sodium benzoate of  $7\frac{1}{2}$  grains, which caused her to mumble something; that thereafter the doctor gave her inhalations composed of oxygen 95% and 5% carbon dioxide; that when she was given these inhalations she would turn her head aside, so that the inhalations would have to be pressed upon her; that during the time the doctor was in attendance upon her he observed that she pulled the bed-clothing over her shoulders to cover her bare arms; that she remained on the vessel from the time that she was brought on the upper deck until approximately two o'clock in the afternoon; that her lips were observed to be cyanosed during the time she was on the vessel; that she would not answer questions directly put to her; that during the ride to the hospital, St. Francis Hospital, in the ambulance she did talk some; that when she arrived at the St. Francis Hospital she was given medicines which have been described as being the ordinary treatment for alcoholism; that she was put in an oxygen tent shortly after she arrived at the hospital; that on the evening of the day when she arrived at the hospital she was examined by a physician who found her condition and described it to be negative so far

900 as he could determine from the examination; that it was observed, as she stayed in the hospital, that with regard to events which had happened on the vessel she said she could not remember, although at the same time it was observed and recorded that she was very talkative; that she remained in the hospital until March 7; that while in the hospital she told the attending physician she feared that her husband would regain custody of the child because he might learn of what had happened on the vessel; and assume further that she was thereafter



discharged from the hospital and went to her home in Archway Villas in Miami Beach and remained there until sometime in May of 1936, and that during that time her symptoms were as follows: she said she could not remember what had happened on the vessel; she expressed the fear that her husband would get her child; she wept very frequently; she was apathetic; she expressed herself by saying, "What's the use." On occasion she expressed the desire to do away with herself, and that she remained in that condition during the time that she was on Miami Beach and until she returned to St. Louis, which was in May.

Now, doctor, I want you to assume that this young lady was not in any way affected by carbon monoxide gas at the time that she was on the vessel, and I want to know what your opinion is with regard to whether the symptoms which I have described to you indicate to your mind any entity recognized by the medical profession as a part of mental pathology.

901 Mr. Mershon:

We object to that question upon the following grounds: First, the assumption that the young ladies were not affected by carbon monoxide gas is in contradiction of the record itself, wherein petitioner's own testimony has shown that carbon monoxide gas actually got into the room, in some amount and degree, where the young ladies were sleeping at the time they were affected; second, the hypothetical statement omits many other undisputed factors brought out in the evidence in this case; third, the proper predicate has not been laid for the expression of the requested opinion. The question completely overlooks the diagnosis made by the first attending physician, shown in the hospital records, of the condition of the young lady referred to; and fourth, the question fails to take into consideration the fact admitted in the evidence of the petitioner that the young lady in question

was exposed to carbon monoxide fumes prior to being found in the condition described by counsel.

The Court:

Mr. Parmer, I understand your assumption that the young lady in question was not affected by fumes of any monoxide gas, but ask the witness if on the predicate laid he was of the opinion that the symptoms embodied in the question were consistent with your contention of the—

Mr. Parmer:

I was leading up to that.

The Court:

But as framed it seems to me that the incorporation of a negative monoxide poisoning feature is inconsistent with the general nature of your entire question.

Mr. Parmer:

You see, I want him to explain, if he can, whether these symptoms can be produced in the absence of any carbon monoxide poisoning, so I have asked him very carefully—excluding Mr. Mershon's assumption that carbon monoxide gas was in the room—that these  
902 women were not affected by it, or that this woman was not affected by it. First I want to know whether he recognizes in these symptoms an entity known in mental pathology; and so far as carbon monoxide is concerned, your Honor, I do not know of any doctor outside of Dr. Foxworthy who has said that they were affected by it, and he said that when he saw them they showed the results at that time of former carbon monoxide poisoning. Doctor Howell said that in his opinion it was more alcoholism than it was carbon monoxide poisoning, if it was carbon monoxide poisoning at all; and Doctor Harris said that he could not express an opinion as to what

it was at the time that he saw the girls except on the basis of a history.

Mr. Mayne:

But he did say that it was not intoxication.

Mr. Parmer:

He said it possibly could be.

The Court:

As framed I think the question is objectionable in that it assumes the negative with reference to carbon monoxide poisoning.

(By Mr. Parmer):

Q. Now having in mind the assumptions that I asked you to take into consideration, have you any opinion with respect to the causation of such mental symptoms as I have described to you?

A. Yes, I have.

Q. Will you tell us what it is?

A. Such a group of symptoms could form an entity known as reactive emotional depression.

Q. Could that be caused by the events which preceded the removal of the young lady from the vessel?

A. It could have been caused by the total circumstances which you have described.

Q. Will you explain the manner in which such symptoms are produced?

A. I describe that condition as reactive emotional depression and by reactive emotional depression we recognize a group of symptoms whose outstanding feature is a slowing up of all processes, both mental and physical. By a reactive depression we mean a depression which is caused by a reaction to some set of circumstances. Now we are all reacting at all times to different stimuli; the reaction to a pleasant situation is one of joy, and the re-

action to an unpleasant situation is one of sadness. Now when that sadness arises—which everybody has suffered in their time more or less—there are two ways to meet it: one is by attacking the situation with courage and confidence; the other is to go into a state of inactivity, which method represents a technique for the avoidance of what the person thinks he is suffering. It is the choice between these two courses that we think of the will. A person who is rather strong-willed will chose the course of courage, but a person who does not want to invoke that will will go in the opposite direction. It is also known that the depressed condition is also characterized by painful ideas and painful thoughts, and that these also are brought about by a preoccupation with an unpleasant situation. We also know that these powerful stimuli, or any powerful stimulant, inhibit activity. Now there are patients who are, on the other hand, very active rather than depressed, and I recall one such patient who was elated and very active rather than depressed, 904 and I recall one such patient who was elated at the time the November storm struck, and that was a rather powerful stimulant, and during the noise and during the excitement of that time there was a great deal of calming of that person.

I believe that answers your question.

Q. Will you apply your general observations to the specific circumstances which I have asked you to assume and state to the Court in what manner those circumstances are related to the symptoms which you recognize as the entity of reactive depression.

A. I would have to assume that this woman, in common with other mothers, was fond of her child, and that judging from her previous expression of fear that she might lose the child, and even before this happened her foothold on the child was even then precarious—

By Mr. Mayne:

May I interrupt there, in order that the doctor may know something about this divorce matter and will not have the mistaken idea about it. Will you permit him to take into consideration that she filed suit for the divorce in December, 1934, in the City of St. Louis, St. Louis County, Missouri; that she secured custody of the child, with the privilege however of the father seeing the child for a period of two weeks in the summertime, and also a period of one week, alternating at Christmas-time, after the child reached the age of five years, but in the meantime he was privileged to see the child at certain times and occasions that he might desire; and that this divorce was granted one year and four months before this accident.

905 Mr. Parmer:

I would be perfectly willing to have him take your statement into consideration.

Mr. Mayne:

And that the child at the time of the divorce was a baby of just ten months old.

Mr. Parmer:

I would be perfectly willing to have him take that into consideration.

Mr. Mayne:

May he also take into consideration that when Mrs. Just was here in Miami she was in the company of her aunt who lives with her all of the time, and also a nurse, and also that her child was here with her at that time.

(By Mr. Parmer):

Q. You will take all of that into consideration, doctor, and continue with your answer.



A. (Continuing) Then we would have to say, since she was rather sure of the child's custody, that such a fear as she expressed before March 2nd or thereabouts was a morbid fear, at least a foundation for it. She had taken excursions on this boat previous to the one of February 28th, of which her aunt had no knowledge—

Mr. Mayne:

We object to that. The aunt did have knowledge.

Mr. Parmer:

As far as the answer is concerned there is no evidence from the aunt as to what her knowledge was, but there is evidence, Mr. Mayne, that the mother did not know about it.

Mr. Mayne:

That is correct; she was in St. Louis.

(By Mr. Parmer):

Q. Go ahead.

A. But on this one previous occasion she could disguise the fact that she had been on this trip, but on the trip in question such a disguise was impossible because she was brought out in an unconscious condition and had parts of this affair spread upon a hospital record, and it would be natural that the fear already present would be accentuated that the husband would regain control of the child, and it was the preoccupation with this morbid fear and other morbid thoughts that caused the reactive emotional depression to arise.

Q. Well now, doctor, would the presence of relatives have any effect on the origin or continued maintenance of that depression?

A. I don't believe I could answer that except in this way: that it is my custom, if I am treating such a patient

in the hospital, to ask the family to stay away for a period of three or four weeks or even longer, but in this particular case I could not say.

Q. What is the reason for such advice?

A. Because any member of the family will bring up strong emotional reactions; a photograph will do the same thing. We know in these cases that if you give them a photograph album it recalls emotional scenes such as of childhood and things of that sort, and will make them more depressed and retard their recovery, but with a stranger that emotional tie does not exist.

Q. What is the effect on the memory of such a reactive depression as you have described?

A. The memory will be slow, and all of these functions seem to follow the same groove and in about equal parts.

Q. Is it one of the symptoms of such a depression that the memory is affected somewhat?

907

A. It is a symptom.

Q. It is?

A. Yes, but the degree depends on the depth of the depression, naturally.

Mr. Parmer:

That is all. You may cross examine.

#### Cross Examination.

By Mr. Mershon:

Q. Doctor, is it possible to have an injury to the human brain and nervous system as the result of exposure of the patient to carbon monoxide gas?

A. Well, I only have a general knowledge of carbon monoxide, the facts that are well known but not very special knowledge on that subject.

Q. You made the statement white ago that "we know certain things." You mean by that the members of your particular profession?

A. Yes.

Q. That is neurology and psychiatry?

A. Yes.

Q. Don't you also know as a recognized fact that there may be serious injuries and serious results to the human brain and mind and the nervous system flowing from exposure to noxious quantities of carbon monoxide gas?

A. Yes.

Q. Now all of the testimony which you have given here in response to the questions asked is based upon  
908 the assumption that there was an entire absence of any history of exposure to any carbon monoxide gas, was it not?

A. I became a little confused with the objections on that point, but that was my impression.

Q. That carbon monoxide did not enter into the question at all was your impression, was it not?

A. I would like to know how that question was finally stated.

Q. It is my understanding, doctor, that you were asked to assume that there was no exposure to carbon monoxide gas whatsoever. Was that your understanding of the question?

A. That is right.

Q. Then your answers were based upon the assumed fact that there was no element of carbon monoxide poisoning whatsoever present in the case history of the lady about whom you were asked to testify?

A. As I remember the question, it stated what entity to mental pathology would this group of symptoms remind me of, but it seems that the question of carbon monoxide at that time was left out.

Q. And that is what you understood in giving your answers, that is, that it was left out?

A. It was what entity the group of symptoms presented reminded me of.

Q. It didn't take into consideration carbon monoxide poisoning at all?

909 A. That wasn't in the question.

Q. Doctor, do you know Dr. I. H. Agos of Miami?

A. Yes, I do.

Q. What branch does he specialize in?

A. He is a general practitioner.

Q. Is he not a neurologist and psychiatrist?

A. He was up until two or three years ago but he dropped it and is now engaged in general medicine.

Q. Do you remember definitely when he dropped the specialty of neurology and psychiatry?

A. No, I do not know the date but the last directory is the 1936 directory and he wasn't listed in that as a specialist.

Q. For a period of ten years or more, however, in Miami and this vicinity he had specialized in psychiatry and neurology, had he not?

A. That is true.

Q. And he had been a consultant in that line, had he not?

A. Yes, sir.

Q. Would this condition or this entity that you were asked about or these symptoms which you were asked about, which you say constitute an entity, would they be diagnosed as a definite psychosis?

A. Yes, a definite psychosis.

Q. If the young lady in question, whom we will assume was Mrs. Charlotte Just, was found unconscious in her bed aboard the boat on the morning of March 2, 1936, and thereafter, on May 22, 1936, she had been

910 actually examined by Dr. I. H. Agos of Miami, in consultation with two other physicians, and at that time his examination revealed a very noticeable, highly emotional individual, and that she was in a state of marked depression; that there were no gross physical or

neurological organic lesions demonstrated, and that from the history of the case obtained through her relatives and attending physicians she had been in a highly emotional and agitated state since having been exposed to carbon monoxide fumes several weeks prior to the examination, that is to say, on or about March 1st and 2nd, 1936, and if Dr. Agos had diagnosed her condition as a psychosis resultant of carbon monoxide poisoning, would you be prepared to disagree with Dr. Agos?

Mr. Parmer:

I object to that. There is no evidence here that Dr. Agos ever made any such diagnosis; he has not been called.

Mr. Mershon:

He has not had an opportunity yet. This is cross examination, if your Honor please, and we do not want to keep shifting these doctors back and forth.

The Court:

We will go far astray if we assume facts either on the direct examination or cross examination not in evidence.

Mr. Mershon:

I adhere to Your Honor's ruling. That is all.

The Court:

Any re-direct examination?

Mr. Parmer:

That is all, doctor, thank you.

The Court:

All right. With the exception of the deposition that concludes the testimony?



911 Mr. Mershon:

If Your Honor please, we made a motion to strike the percentages shown by the chemist's testimony of carbon monoxide gas found in the stateroom on the grounds set forth in our motion, which motion, if sustained, would render the testimony of Dr. Henderson incompetent. We will leave the procedure entirely to Your Honor.

The Court:

I have thought over that. I think there is sufficient similarity to justify the introduction of that evidence, so I will overrule the objection and allow the testimony of Mr. Walker, the chemist, to stand.

Mr. Mershon:

We understand that Your Honor is reserving the right to pass upon the whole evidence which is offered in the record?

The Court:

Yes.

Mr. Mershon:

Before we start reading the depositions, the claimants severally wish to object to each and every of the hypothetical questions interposed to Dr. Henderson upon the same grounds that have heretofore been interposed in the motion to strike the percentages found by the witness, Mr. Walker, the chemist, and upon the further grounds that the hypothetical questions assumed facts that are contradicted here before the Court, and upon the further ground that the hypothetical questions are based upon evidence which has been contradicted by the witnesses of the petitioner. And we will add the ground, if Your Honor please, that the proper predicate has not been

laid for the introduction of expert testimony by Dr. Henderson.

912 The Court:

I will recognize the fact that your objections have been made, and that will save you interposing those several objections as each question is asked, and of course I prefer not to rule on them until I hear the depositions read. I shall not rule on the objections at this time.

(Thereupon the deposition of Dr. Yewdell Henderson was read in open Court by Mr. Parmer.)

Mr. Mershon:

The claimants severally move to strike each of the hypothetical questions and the answers thereto upon the following grounds:

It affirmatively appears that the questions are based upon a test shown not to be similar to the actual conditions existing at the time the claimants herein were exposed to the carbon monoxide gas.

The questions admit a complete absence from the air of carbon monoxide up to the period of ten minutes to seven, while the undisputed evidence shows that on the night the claimants were exposed to the carbon monoxide gas the engines or motors of the yacht had been operated for approximately two hours and twenty minutes prior to the claimants entering the stateroom.

913 The questions are vague and indefinite, in that they assume that the air in the room was normal and no facts are shown or included therein to show that the two women had been asleep in the small enclosed room for several hours, and by breathing the air had decreased the amount of oxygen therein and thereby increased the amount of carbon monoxide gas.

The questions omit all treatments given to the claimants, and especially omit the treatment of oxygen mixed with carbon dioxide.

The questions assume that the claimants were exposed to identical conditions because the claimants were in the same stateroom, and omits therefrom any possibility of one being subjected to a greater degree of monoxide, due to the fact that she slept directly over the pipe exhaust pipe which had holes therein.

The claimants move to strike from the deposition that part wherein Dr. Henderson reads from a book, upon the ground that the matters are mere hearsay, and it is an attempt to introduce in evidence the statement of some author who was not under oath at the time.

Mr. Parmer:

I will reply at this time or—

The Court:

You can cover that in your memorandum.

(Hearing concluded.)

914 In the United States District Court for the  
Southern District of Florida, Miami Division.

In Admiralty, No. 147-M-Ad.

In the Matter of The American Yacht "Friendship II".

Deposition of Yandell Henderson, Ph. D., a Witness on  
Behalf of the Libelant and Petitioner, Taken De  
Bene Esse Pursuant to Sections 639, 640 and 641, of  
Title 28 of the United States Code Annotated, Pur  
suant to Notices Annexed Hereto, at 4 Hillhouse  
Avenue, New Haven, State of Connecticut, on the  
30th Day of September, 1937, at 11:15 O'clock A. M.,  
Taken Before John H. Weir, Esq., a Notary Public  
in and for the County of New Haven in and for the  
State of Connecticut.

Appearances:

Kirlin, Campbell, Hickox, Keating and McGrann,  
Esqrs., by Vernon S. Jones, Esq., 125 Broadway,  
New York, N. Y.,  
For the Libelant and Petitioner.

There was no appearance for the claimants.

F. H. Cogswell, Reporter, 504 Orange St., New Haven,  
Conn.

Mr. Jones:

I offer in evidence a notice of the taking of the deposi  
tion of Dr. Yandell Henderson with proof that it was  
served on the proctors for the claimants on September  
24, 1937, at 3:13 p. m., and ask to have that marked  
Exhibit I.

(The notice referred to dated September 24, 1937, was  
then marked "Libelant and Petitioner's Exhibit I.")

Mr. Jones:

I offer in evidence a second paper and ask to have it marked Exhibit 2, which is a notice of the adjournment of the deposition of Dr. Henderson from September 28 to September 30, which notice contains proof of service on the proctors for the claimants on September 25, 1937.

915 (The notice referred to dated September 25, 1937, was then marked "Libelant and Petitioner's Exhibit 2.")

DR. YANDELL HENDERSON, 440 Prospect Street, New Haven, Connecticut, a witness on behalf of the libelant and petitioner, being first duly sworn by John H. Weir, a notary public, testified as follows:

Direct Examination.

By Mr. Jones:

Q. Dr. Henderson, will you please state your age, your education, your training and your experience with carbon monoxide gas in its effects on human beings?

A. I was born in Louisville, Kentucky, April 23, 1873, and I am, therefore, now sixty-four years old.

My early training was at Yale University in physiological chemistry, and then at the Universities of Marburg and Munich in Germany.

In 1912 the United States Bureau of Mines requested the American Medical Association to nominate a commission of experts to investigate the subject of poisoning of mine gases and methods of resuscitation. I was appointed on that commission. After it had rendered its report, the director of the Bureau of Mines requested me to continue as a consulting physiologist of the United States Bureau of Mines in regard to mine gases and methods of protection.



My report on this subject after four years of work was published by the Bureau of Mines, and was made the basis of the offer by the Bureau of Mines to take charge of the scientific work in regard to war gases for the United States Army; and I was throughout the war the head of the Medical Section of the war gas investigations for the United States Army. I have continued in an advisory relation to the Chemical Warfare Service until now.

With Dr. A. W. Haggard of Yale University and Mr. A. H. Fieldner of the Bureau of Mines and others I carried out the investigations for the Tunnel Commissions of the States of New York and New Jersey, which were made the basis of the ventilation of the Holland Vehicular Tunnels under the Hudson River at New York. The

916 principles that we established and the standards that we set up have been adopted for all tunnels and other places where carbon monoxide occurs, since that time.

With Dr. Haggard I developed the treatment for carbon monoxide asphyxia by inhalation of oxygen and carbon dioxide, which is now used by the rescue crews of the police and fire departments of all American cities, and has been generally adopted all over the world.

The book, "Noxious Gases", by Dr. Haggard and myself is the standard on that subject in that field, and was published in New York in 1927. It was translated into German, and is the standard work on that subject in industrial medicine in Europe.

Q. Does your work for the Bureau of Mines and your work for the Chemical Warfare Service include experiments and studies in carbon monoxide gas?

A. Yes. That was one of the principal fields that we worked on.

Q. Are you now a resident of New Haven, Connecticut?

A. Yes. . . .

Q. Are you connected now with Yale University?

A. Yes, I am professor of Applied Physiology.

Q. Tell us what degrees you have.

A. B. A. from Yale in 1895 and Ph. D. in 1898.

The work particularly for the vehicular tunnels involved large numbers of experiments on men, in which they were given graded amounts of carbon monoxide, and were made to breathe it for definite times, in order to show what concentration of gas for what times would induce what effects.

Q. That is an elaboration of your answer to the previous question?

A. Yes.

Q. Will you state, Dr. Henderson, what the physiological effect of carbon monoxide is upon a human being who breathes it?

A. Well, the effects vary with the concentration of the gas breathed and the length of time of exposure. With quite low concentrations, that is, one or two parts in 10,000 there are no marked effects even after four or five hours—there are no effects other than slight lassitude.

Q. Have you taken into consideration in that  
917 answer the volume of breathing?

A. If the individual is exercising vigorously, the effect would be slightly greater. But men working in garages, even people on the street, breathe small amounts, that is, one or two parts in 10,000 for some hours at a time without more than possibly a slight headache. When the amount is about four or five parts and is breathed for an hour without vigorous exercise, the individual may have in that case a somewhat distinct headache. But definite discomfort does not occur or is induced until seven or eight parts in 10,000 are breathed for at least an hour. By that I mean that in

tests on myself and my associates and on students who volunteered for this work we could subject ourselves to that test and still go on with our work in the laboratory through the rest of the day. The important feature is that as soon as the individual comes into fresh air, these low concentrations of gas are rapidly eliminated. By rapidly I mean a couple of hours.

Q. Now, will you explain, Doctor, how the carbon monoxide produces these symptoms? The physiological explanation for the manner in which carbon monoxide causes the symptoms you have described under the circumstances as you have described them.

A. The body lives on oxygen, and while the vital combustion is in many respects different from the combustion is a flame, yet there are also points of similarity. Carbon monoxide produces its effect by combining with hemoglobin of the blood. The hemoglobin of the blood is the substance that carries oxygen from the lungs to the tissues. Accordingly when a part of the hemoglobin is combined with carbon monoxide, it is temporarily rendered incapable of carrying oxygen; and the effects of the diminished supply of oxygen are somewhat like those seen in a lamp or a fire when the supply of air is diminished. The effects I have discussed up to this point fall far short of any condition approaching asphyxiation.

Q. Dr. Henderson, will you assume the following state of facts, first, that two young women in their twenties are asleep in a room on a yacht with no carbon monoxide in the air until a time about ten minutes of seven in the morning, when the engines of the yacht are started, and assume from then on that carbon monoxide begins to escape into the room at a rate so that at the end of two hours there are eight parts in ten thousand of carbon monoxide—eight parts of carbon monoxide to ten thousand parts of air; assume that at the end of two hours the two young ladies are

taken out of that room and taken into the fresh air, can you or can you not state with reasonable certainty from those facts whether either of the young ladies would suffer permanent physical harm from their experience?

A. I can state absolutely that they would not, for this reason.

Q. Will you give your reasons for your answer?

A. Yes, for this reason, that eight parts of carbon monoxide in the air for one hour would not be more than these women would have been exposed to, as the gas gradually accumulated in the room. That is, during the first hour there would not have been more than four parts, which is too little to do more than induce a slight headache; and the fact that eight parts was the amount reached at the end of two hours indicates that they were exposed to the equivalent of not more than eight parts for one hour. That is, the effects would not be greater than those produced by eight parts in one hour.

I have carried out many experiments on myself and my associates in setting the standards for garages and for tunnels and so on, and we have published the results, which show that the maximum amount of carbon monoxide reached in the blood under such conditions does not exceed thirty per cent.

Q. Is that thirty per cent of saturation?

A. Thirty per cent of saturation. During rest the factor of safety in the blood is sixty per cent. That is, only about thirty per cent of the oxygen is taken up by the tissues, and sixty per cent of the oxygen goes on into the venous blood. In a person with a thirty per cent saturation with carbon monoxide there would still be a factor of safety of something like thirty per cent—thirty per cent combined with carbon monoxide, the remaining sixty to seventy per cent combined with oxygen, of which the tissues would take up only about thirty per cent, so that there would still be an ample excess supply of oxygen.



This degree of saturation will induce ill temper, and will cause a headache, but is not enough to cause unconsciousness, although on severe exertion it might induce fainting. All of the carbon monoxide would to be eliminated from the body, as numerous experiments in my laboratory have shown, in two or three hours; and no subsequent effects are induced. In actual practice there are thousands of garage workers who in the course of a day's work are exposed to as severe conditions as these, and suffer nothing more than a headache which passes off in a few hours without subsequent ill effects.

Q. Have you ever heard of a case under the circumstances I gave you in the hypothetical question where there were any permanent effects?

A. Never where the breathing of carbon monoxide was the sole condition. Where the individual is intoxicated with alcohol, the effects of alcohol may also have to be taken into account.

Q. Of course, in the hypothetical question I gave you, Doctor, I was not assuming anything about alcohol, do you understand that?

A. Yes. I was discussing purely carbon monoxide, but I had understood that these women were in some state of depression or unconsciousness at the end of the two hour period.

Q. Is your answer to the question the same? You know you eliminate all conditions of alcohol. On the bare facts that I gave you?

A. Yes, yes.

Q. Now, Doctor, I want you to assume the  
920 following facts. Assume two ladies in the twenties go to sleep in a room on a yacht where the air is not contaminated—where it is normal, and at ten minutes of seven in the morning the engines are started while the ladies are still in the room asleep; and at approximately nine o'clock in the morning the young ladies are removed from the room, and both are found to be



unconscious. They are carried up to the deck and the fresh air, and one of them revives within a few minutes and talks, and the other one revives in response to physical stimuli like slapping and shaking and speaks to a doctor. Also assume that the cause of their unconsciousness was carbon monoxide gas. Can you state with reasonable certainty whether or not there would be any permanent physiological after effects from such an experience?

A. There most certainly would not. The fact that they became conscious sufficiently to answer a question within a few minutes after being removed from where the gas was would be absolute, certain evidence that they had not absorbed enough carbon monoxide to produce a forty per cent saturation in the blood; and no after effects ever follow from a brief exposure to carbon monoxide, in which the amount of carbon monoxide absorbed does not rise above forty per cent saturation.

Q. Now, in the various questions I have addressed to you I have asked you to state your opinion on the physiological effects. Tell me whether in your answer to that question you were taking into consideration neurological and pschiatric effects?

A. Yes, I was.

Q. And your answer is the same?

A. My answer is the same. Neurological effects occur only in cases in which the saturation of the blood has risen well above fifty per cent of saturation, and the exposure has lasted for several hours, and the patient has remained unconscious for many hours thereafter—as a figure I would say at least twelve hours. In those cases there are neurological effects, that is, upon the eyes and upon the equilibrium and so on. Psychic effects are not consequences. I mean by that the sort of conditions for which people are sent to insane asylums. There is, after a severe asphyxiation such as I have described, a loss of memory, but in con-

tradistinction to neurological effects psychic effects are absent even after severe asphyxiation.

Q. You spoke of cases of severe asphyxiation such as you have described. Will you tell us exactly what they are, so that we may have it clearly in mind in what cases there might be a loss of memory?

A. Well, a severe asphyxiation occurs with illuminating gas, when a man hangs his trousers on the gas burner in a room lighted by illuminating gas, and lies in that room for twelve, fourteen, eighteen hours, so that his blood becomes at least fifty—generally sixty—per cent saturated, and he continues in this condition for many hours. In those cases unconsciousness lasts sometimes anywhere from a day to two or three days, or even a week. That is the type of severe asphyxiation that produces serious subsequent neurological effects, but not psychic effects. These cases, for instance, do not suffer from hallucination.

Q. Or psychosis?

922

A. Or psychosis, or at least I have never in a very wide experience known of a case which did. But many cases of these severe conditions suffer from neurological effects. The essential point is that the saturation of the blood must exceed fifty per cent—generally even sixty per cent—of saturation, and the exposure must last for many hours, and must be followed by a prolonged period, lasting sometimes for days, of coma, that is, unconsciousness.

Q. When you speak of coma and unconsciousness, are you taking into consideration the type where there is uninterrupted unconsciousness?

A. Yes, it is unconsciousness; they cannot be roused. If they are roused by any sensory of stimulation or by the injection of any drug or by ammonia held under the nose or anything of that sort, the unconsciousness is not deep, and there is not much carbon monoxide in the blood. In cases of severe asphyxiation conditions of coma are found as in surgical anesthesia.

Q. I want you to assume, Doctor, that two young ladies in the twenties are carried into the fresh air after exposure to carbon monoxide gas, and that they are unconscious, and that each of them is within two hours given an injection of caffein sodium benzoate of seven and a half grains, and that immediately both of them spoke to the doctor, can you state with reasonable certainty whether or not the carbon monoxide, if you assume it produced the unconsciousness, in that case would have any permanent after effects on either of the young ladies?

A. It certainly would not, because the fact of their responding to that rather mild stimulation would show that the unconsciousness was not deep, and would indicate that the greater part of the carbon monoxide has already been eliminated.

Q. Can you state with reasonable certainty,  
923 Doctor, whether the inhalation of carbon monoxide gas, no matter in what quantities, ever produced a psychosis of fear in persons subjected to it?

A. I have never known of a case out of many hundreds—perhaps thousands—that have come to my attention. That is not the type of effect that follows.

Q. Will you describe again the type of effect which carbon monoxide produces upon the body?

A. Well, in these severe prolonged asphyxiations, which are quite rare as a matter of fact, the after effects may be loss of sight or partial loss of sight. It may be inability to walk without staggering or inability to carry out precise movements with the hands. The effect on the mind is mainly in loss of memory and a tendency not toward insanity but toward idiocy, stupidity. That is, these cases are extremely stupid.

Q. Assuming that a person who is subjected to any degree of carbon monoxide poisoning, afterward recovers consciousness, and thereafter develops a psychosis, but at various times she exhibits an active and alert mind,

can you state with reasonable certainty whether or not carbon monoxide poisoning was a competent cause of that psychosis?

A. Carbon monoxide would not even be a contributing cause.

Q. What is the reason for your conclusion, Doctor?

A. Well, mainly that it just never does. It never has that type of effect.

Q. Is the fact that the mind is at any time alert after the incidence of carbon monoxide exposure conclusive evidence or not that carbon monoxide has not damaged any of the brain or nerve cells?

A. It is perfectly clear evidence that the type of effect that carbon monoxide produces has not occurred.

Q. Now, you spoke a minute ago, Doctor, of the impaired vision of certain persons exposed to an unusually large amount of carbon monoxide poisoning. Can you describe the physiological basis of that lack of diminished vision?

A. The basis is really anatomical. That is, 924 when the person later dies and is autopsied and the brain is examined, spots of softening can be found in certain areas. These areas correspond fairly well with the parts of the body that have not been functioning properly.

Q. Has the carbon monoxide any physiological or anatomical effect upon the optic nerve itself?

A. No. The effect is not upon the optic nerve; it is upon the centers in the brain. But it should be understood that those cases are extremely rare, and that a severe asphyxiation generally either dies or recovers completely. Only a very small percentage of severe asphyxiations which did not die at the time suffer any permanent after effects.

Q. My inquiry now, Doctor, is directed toward the character of the effects suffered by persons who are exposed to these extreme degrees of carbon monoxide pois-



oning. Have you told us now all of the physiological and anatomical effects upon the structures of the body, which are produced by carbon monoxide gas poisoning?

A. Well, in order to induce any subsequent effects, the asphyxiation must not only be severe but it must be prolonged.

Q. Yes. Well, with that modification will you listen to the question as it is read again and attempt to answer it?

(The last question was read by the Reporter.)

A. The optic nerves pass back through the skull to what are called the basal ganglia, and there they have relays by other nerve fibers to parts of the cerebrum, which are the seat as far as we know of the intelligence. The injury that prolonged asphyxiation occasionally induces may be either in the basal ganglia, with which the optic nerves first connect, or in the cerebral hemispheres. More commonly the basal ganglia are effected, and that is the reason why neurological effects are more common than psychic effects.

Occasionally in the eye a condition of so-called  
925 opera glass vision develops, in which the periphery of the retina is damaged or practically destroyed so far as seeing goes, and only the central part of the retina remains, so that the individual sees only a very small area of what is directly in front of his eyes.

Q. Doctor, have you ever heard of papilla edema?

A. Yes, but I don't know much about it in relation to carbon monoxide asphyxiation.

Q. Isn't papilla combined with an edema?

A. I thought you referred to something else. Edema is commonly a result of a disease of the kidneys in which the kidneys fail to eliminate salt in the amounts in which it is eaten, and the salt remains in the body. It holds



back water also, but that is not at all a common occurrence after carbon monoxide asphyxia, if ever.

Q. Have you ever heard of a papilla edema of the optic disc as a result of carbon monoxide poisoning?

A. I don't think that I have ever heard of that particular occurrence as a result of carbon monoxide poisoning.

Q. Can you state your opinion with reasonable certainty whether that could be the result of carbon monoxide poisoning?

A. I should think that after a prolonged asphyxiation it might, but a very prolonged asphyxiation would be required.

Q. Will you tell us in detail what you mean by that prolonged asphyxiation which you say would be necessary to possibly produce that condition of the optic nerve?

A. It would be such an amount of carbon monoxide in the air as would induce a fifty or sixty per cent saturation of the blood, and would be continued for many hours, perhaps all night, and would be followed by a prolonged period of deep unconsciousness. By prolonged I mean all day or several days. Experimentally it is really rather difficult to induce such a condition for the reason that the animal—and the same is true clinically—the animal or patient either dies or recovers completely thereafter.

I might add that in a book which I have been writing about this general subject, I have made the positive statement, which I believe is in accord with the opinion of competent authorities, that there is no such thing as chronic carbon monoxide poisoning.

Q. Doctor, I want you to assume the facts I gave you in the first hypothetical question. Do you recall those or would you like to have that question again?

A. I think I remember.

Q. I want you to assume the additional fact that one of the girls was found some time later—by that I mean months—to have an edema of the optic disc. Can you state with reasonable certainty whether or not that condition of the optic disc was or was not due to carbon monoxide inhalation?

A. It most certainly was not, because the conditions as described in the questions would be wholly insufficient to have any severe subsequent effect.

Q. Now, I want you to assume again, Doctor, that these girls were exposed to carbon monoxide while they were at rest for a maximum period of two hours, and that the quantity of carbon monoxide to which they were exposed started at the beginning of the two hour period at zero, and at the end of the two hour period was not more than eight parts in ten thousand, and that they then were removed. Can you tell me during the two hours they were there what the probable percentage of saturation of their blood was at the end of the two hours of carbon monoxide inhalation?

A. It is quite certain that it would not exceed thirty per cent saturation.

Q. Now, assuming, Doctor, the other facts I have given you in the hypothetical question, and assuming further that at the end of the two hours the girls were brought out into the open air, and that one of them recovered completely within an hour—and by recovery I mean she was thoroughly conscious and talking, but that the other girl, after being brought to consciousness by injections of caffein sodium benzoate, lapsed off again into unconsciousness, can you state with reasonable certainty whether carbon monoxide would account for the difference in the respective symptoms of the girls that I have just recited?

A. No. If the two girls were exposed to the same conditions, the degree of saturation of their blood would necessarily be very nearly the same, and would not ex-

ceed thirty per cent saturation, and this would correspond with a very early awakening on the part of one or both; and if one of them did not awaken, I should expect to find some other reason for her not awakening.

Q. Assuming the same facts which I have just given you, Doctor, and that one girl responded and came to consciousness almost immediately after being brought into the fresh air, can you state with reasonable certainty whether the longer unconsciousness of the other girl was the result of carbon monoxide poisoning?

A. It certainly was due to some other accessory cause.

Q. Will you tell us what the accepted relationship is between the time of exposures, the concentration of carbon monoxide gas breathed and the corresponding symptoms for various concentrations, or for modifications of those three factors?

Q. For that purpose I can't do better than quote a statement which was published in a government report and in scientific journals, and has been very widely adopted.

It is to this effect: (Reading from a volume.)

"The whole matter may be more simply summed up in an expression involving the time measured in hours, the concentration of carbon monoxide in the air in parts in ten thousand, and a constant for each degree of physiological effect.

928 "The physiological effects of all concentrations and times (within reasonable limits, that is, a few hours) may be defined as follows:

"(1) Time X concentration = 3, no perceptible effect.

"(2) Time X concentration = 6, a just perceptible effect.

"(3) Time X concentration = 9, headache and nausea.

"(4) Time X concentration = 15, dangerous.

"Physical exertion and increased breathing would reduce the constant in the first equation from three to two or one, or even less, and would affect the other equations correspondingly."

(The witness continued his testimony as follows:)

This is the most general statement that has yet been drawn up, and it is now universally accepted by experts.

The conditions described in the hypothetical question fall short of the severity indicated under (3).

As regards the conditions defined by line (4), by "dangerous" is meant that if the time or the concentration is exceeded, death may occur; but even under those conditions if recovery occurs at all it is complete in ninety-nine cases out of a hundred.

Q. Does the table that you have just given us assume that during the time of exposure the patient was at rest, and, of course, if the patient were not at rest, the table would be varied accordingly, would it not?

A. Yes, during exercise the absorption of gas is more rapid.

Q. Now, Doctor, assuming that the two girls in their twenties were subjected for two hours to a concentration of carbon monoxide gas, which commenced at the beginning of the two hours at zero, and ended at the end of the two hours with eight parts in ten thousand, and that they were at rest all this period, and were then brought out to the fresh air, will you state at what part of the table that you have just announced for us the physiological effects would be identified?

A. They would fall somewhere between lines  
929 (2) and (3).



Q. Can you state with reasonable certainty whether under such circumstances there would ever be any after effects in either of the girls?

A. Never from carbon monoxide.

Q. Doctor, assuming that after the exposure to carbon monoxide, which I just asked you to assume in the last question, thereafter one of these girls developed a psychosis, which was largely expressed sometimes in a recurring fear of having her child taken away from her; at times she was pathetic and at other times excitable and restless; at times taciturn and at other times garrulous; and that at other times her mind was active, so that she could play a game of bridge, and could sit down and bid a game and be able to make the bid and make rubber; and assuming that at times she complained of and actually had a loss of memory, but that at other times her memory and mind were normal the same as before this carbon monoxide incident, can you state with reasonable certainty whether any of those symptoms given you in combination with the others could have been due to carbon monoxide poisoning on the boat?

A. They certainly were not. The apathy following prolonged asphyxiation is continuous. The description does not apply to the after effect of carbon monoxide asphyxiation, even when it is prolonged.

Q. Doctor, assuming that these two girls were subjected in March of 1936 to carbon monoxide poisoning, and that thereafter their blood was found to show some degree of anemia, can you state with reasonable certainty whether the carbon monoxide inhalation was the competent, producing cause of that anemia?

A. The degree of exposure was certainly entirely insufficient to have any such effect. In order to induce anemia there has to be repeated exposures, such as men have who work around blast furnaces.



Q. Will you explain your answer with particular attention to the way in which carbon monoxide is taken into the blood, and to the way, if any, that it is ejected from the blood?

A. Carbon monoxide forms exactly the same kind of a combination with the hemoglobin of the blood as does oxygen, but the attraction is about three hundred times as great. That is, if there is one part of carbon monoxide in the air and three hundred parts of oxygen, and this mixture is breathed for twenty-four or thirty-six hours, the hemoglobin of the blood would be distributed about one-half to oxygen and one-half to carbon monoxide. But to reach this condition requires very prolonged exposure. After the ordinary exposure to carbon monoxide the equilibrium is not reached, because the time is too short; and as soon as the individual breathes pure air, the oxygen of the air begins to displace the carbon monoxide from the blood, so that even when a high degree of saturation has been reached, say, fifty or sixty per cent, all of the carbon monoxide is displaced from the blood in the course of five or six hours. When saturation is thirty per cent or less, even a couple of hours breathing fresh air is sufficient to remove practically all of the carbon monoxide from the blood.

Q. Doctor, assuming that the carbon monoxide poisoning was sufficient to produce prolonged unconsciousness, and by that I mean for days—

A. Yes.

931 Q. But with subsequent recovery from unconsciousness by the subject human being, can you state with reasonable certainty whether or not carbon monoxide would be completely out of the blood at the end of, say, three or four days?

A. Absolutely; completely out of the blood in one day or less.

Q. Assuming thereafter that the same person was anemic, can you state with reasonable certainty whether

the carbon monoxide was a competent, producing cause of the anemia after a mild degree of absorption of the carbon monoxide?

A. There is no anemia induced.

Q. Anemia?

A. Yes, no anemia induced.

Q. In those cases, Doctor, where anemia does result from carbon monoxide poisoning—those cases of prolonged exposure with high saturation, is it due to that part of the anatomy of the body which manufactures the red corpuscles?

A. It is by no means certain that anemia is primarily induced by carbon monoxide.

Q. Can you state with reasonable certainty whether carbon monoxide ever produces anemia in a human being?

A. It is very improbable that it ever does. It generally has exactly the opposite effect.

Q. Now, Doctor, can you state with reasonable certainty whether or not cyanosis of a human being is produced by carbon monoxide poisoning?

A. It is not; for this reason.

Q. Will you explain your answer, please?

A. For this reason, that blood which is combined with oxygen is bright red. Blood which has lost its oxygen and is in the veins takes a bluish tint, but in blood which is combined with carbon monoxide the hemoglobin has a bright cherry red color, and  
932 is very much brighter even than arterial blood.

So that the occurrence of cyanosis would be direct evidence of a lack of any serious amount of carbon monoxide in the blood. One of the standard methods of determining how much carbon monoxide there may be in a sample of blood is to take a quantity of normal blood and add carmin, which is a bright red dye, to it, until it takes on the color of the carbon monoxide blood.

Q. What is that test called?

A. That is a method devised by Haldane.

Q. Assuming that those girls were in a room where they were exposed to some degree of carbon monoxide poisoning for a period of two hours, and were afterward removed, and that within the next ten or twelve hours after they were removed one of the ladies was found to have cyanosis, can you state with reasonable certainty whether or not the carbon monoxide was the cause of that cyanosis?

A. It certainly was not. The cyanosis would prove that there was no considerable amount of carbon monoxide in her blood. If the cyanosis occurred soon after she was removed from the chamber, it would prove that she had less than thirty per cent saturation.

Q. By "soon after" what do you mean, Doctor?

A. Oh, within a half hour; a half or three-quarters of an hour.

Q. Assuming, Doctor, that those two young ladies had been using alcoholic beverages the night before they retired, and that they retired late in the evening and had been indulging in alcoholic beverages, and that they went to sleep in that room, and that they were exposed to carbon monoxide from ten minutes of seven to around  
933 ten minutes to nine in the morning; that they were brought out unconscious; that one of them

was quickly revived and spoke, and after two hours the other was given an injection of caffein sodium benzoate—seven and a half grains—and she immediately responded to that and spoke to the doctor, can you state with reasonable certainty whether or not alcohol was a factor in the unconsciousness of either girl or both girls?

A. I would say that alcohol was a factor, and was the principal factor.

Q. Will you give the reasons for your answer?

A. Carbon monoxide acts somewhat like alcohol both when it is in the body and in its after effects. That is, after an alcoholic intoxication there is a headache, and

after carbon monoxide asphyxiation, or even an exposure to thirty per cent saturation, there is a headache.

The description of these cases fits a condition of alcoholic intoxication distinctly more closely than it does a condition of carbon monoxide asphyxiation, for anyone, after such a moderate degree of asphyxiation that consciousness returns at all within a half hour, generally remains conscious; whereas anyone who is intoxicated with alcohol may be awakened, but the alcohol still remaining in the body tends to again induce unconsciousness. The after effects of carbon monoxide to such a degree as has been described are very much briefer than those of alcohol.

Q. Is the regaining of consciousness and then the lapsing off into unconsciousness a characteristic symptom of carbon monoxide after effects?

A. It is not.

Q. When there is unconsciousness as a result of carbon monoxide poisoning, can you state with reasonable certainty what the course and characteristics of that unconsciousness are?

A. Well, after the patient once again becomes conscious he remains conscious. It is a distinction from alcoholic intoxication.

Mr. Jones:

That is all. Thank you very much, Dr. Henderson.

(Signed) YANDELL HENDERSON.

Read and subscribed and sworn to before me this 2nd day of October, 1937.

(Signed) JOHN H. WEIR,

(Notarial Seal) Notary Public.



935 On April 30, 1938, the Court filed its PRE-  
LIMINARY MEMORANDUM, in words and fig-  
ures following, to-wit:

936 In re: Yacht "Friendship II".

Memorandum:

I shall first discuss the question of the cause of the damage to the two claimants. Several reasons lead me to the conclusion that such damage as was suffered by them was caused by monoxide poisoning, and not by alcoholism. I think the burden of proof is on the claimants to establish this fact. This, I think, they have done.

The manner of attention given to the claimants on the yacht after the condition of claimants was discovered indicates that it was monoxide poisoning. Mr. Yeiser so treated it, and the members of his crew so treated it. Mrs. Just was taken to the hospital and her condition was indicated on the hospital records as gas poisoning rather than alcoholism, and she was so treated in the hospital. Another important fact leading to this conclusion is that the demonstration that was conducted experimentally shows it to be a fact that monoxide gas could, and, I find, did penetrate into the cabin in which the two claimants slept. The theory of alcoholism is not established by the evidence in the record. The amount of drinking that was done was not sufficient to cause unconsciousness of the claimants. Mr. McKay, together with Mr. Yeiser and members of the crew, treated the case as one of gas poisoning, and Mr. McKay's testimony is also strong on the point that sufficient alcohol was not consumed by the claimants to produce unconsciousness. The chief reliance of the petitioner is the testimony of Dr. Henderson. Dr. Henderson is a specialist of high renown, has had extensive experience in experiments and study of monoxide poisoning. His testimony is that of



an expert. A large part of his testimony is, I think, subject to the criticism that the hypothetical questions propounded to him did not incorporate the running of the yacht the Sunday evening before the Monday morning when the yacht returned to Miami. Certain other parts of his testimony are weighty. For instance, his testimony as to a cyanosis being inconsistent with gas poisoning. I do not think it sufficiently appears from his testimony, however, that a blue condition of the skin would not be consistent with the bright color of the blood in the subject at the time. However, as intelligent as the testimony of Dr. Henderson is, I believe the burden of proof was met by claimants in regard to the cause of damage:

I shall next discuss the extent of the measure of care due and owing by Mr. Yeiser to his invited guests. Mr. Yeiser as the owner of the yacht knew of the imperfect condition at one time of the exhaust pipes, and that they were repaired. He should have been on the lookout especially in view of the fact that his two sons felt the effect of monoxide gas in September of 1935. The petitioner's explanation in regard to the September, 1935, occasion is that the boys' damage resulted from monoxide gas being blow back after it was exhausted from the pipes, and that it did not come through the bilge into the cabin. One of the boys was in the after-cabin, and one was in the state room on the upper deck. However, my opinion is that Mr. Yeiser, through his captain or engineer, was held to a higher degree of inspection to determine just what was the cause of the damage to his sons on the occasion of September, 1935. The character of the examination which was made at that time, I think, was more or less superficial. At least it was not careful and sufficient enough to relieve Mr. Yeiser of the possibility that damage was caused by leaky pipes emitting gas into the bilge, rather than coming from the discharge outside of the boat being blown back onto the

yacht by the wind. I think that proper inspection would have disclosed the real condition of the pipes at that time and had their condition been definitely ascertained in September, 1935, it is reasonable to suppose that the condition in which they were in February, 1936, might have been anticipated. Granting that Mr. Yeiser

933 was of the opinion that the fumes from the exhaust blew back on the boat, I do not think he was warranted in having come to that conclusion without having made a more thorough inspection before he arrived at the conclusion that it was the gas wafted back by the breeze instead of gas being emitted from the exhaust pipes into the patch itself. Another matter is that if he was aware, or should have been aware, of the dangerous condition, it was his duty to have warned his guests of the dangerous condition, and I hold that there was sufficient appearing to have charged him with the knowledge of the condition that did exist with reference to the condition of the exhaust pipes. I think there was a duty on Mr. Yeiser's part to exercise ordinary care. *The City of Seattle*, 150 Fed. 537. The claimants were not licensees, nor trespassers, but were guests invited by the owner. *The Silverado*, 14 F. (2) 243. There was some measure of duty due and owing to the invited guests, and it is my opinion that this duty was violated. Mr. Yeiser was charged with knowledge of the condition that existed, and this he should have corrected, or at least he should have warned his guests of the condition existing.

In this finding I regard the burden of proof as being on the claimants, not only as to the cause of the injury, but as to what duty was owing to the claimants, and whether that duty was violated.

We next come to the question of limitation of liability. Whether there is limitation by reason of the lack of knowledge on the part of Mr. Yeiser, can be disposed of in a few sentences. The reasons that have already

been referred to as creating a duty on the part of Mr. Yeiser to his invited guests established this knowledge on his part sufficiently to deny the prayer of the petitioner for limitation of liability. Mr. Yeiser was an engineer himself. The yacht was built in 1922, and he had been the owner for some several years. I think the evidence establishes the fact that the condition  
939 which Captain Patton found, and which was repaired, was made known to Mr. Yeiser. He is charged with knowledge of this repaired condition and the possibility of a recurrence. When monoxide gas was found on the yacht thereafter, it emphasizes the importance of the duty of Mr. Yeiser to have ascertained what was the condition in February, 1936, of the exhaust pipes which had been theretofore repaired. The presence of monoxide gas on the yacht in 1935 brought home the existing facts to Mr. Yeiser sufficiently to create this knowledge on his part. A denial of limitation should be decreed.

In the next place, a very ingenious argument was advanced by the petitioner as to the abatement of the cause of action in personam because of the death of Mr. Yeiser. There is a line of cases applicable to maritime torts within the territorial limits of the States where departure from admiralty law is recognized, in that an action for death may be maintained. This line of cases is recognized by the petitioner. The petitioner also recognizes the point of law as to survivorship of personal injury actions, where the action is in rem. Petitioner's argument is that the Florida survivorship statute, applied to admiralty, is not supplementary legislation, while this line of cases sustaining a right to sue for an action for death is supplementary to the admiralty law; and, secondly, that there would be lack of uniformity in applying the Florida statute, while this line of cases does not conflict with the uniformity required by the United States Constitution in regard to admiralty

matters. I can well see the distinction contended for with regard to the creation of actions for death being supplementary, inasmuch as there existed no such action in admiralty. The admiralty law recognized no survivorship in actions for damages, but with reference to rem pleadings there was a departure from the rigid admiralty law. As to a conflict with the uniformity required by the United States Constitution in regard to admiralty matters, I do not think the point is well taken because such uniformity is no more stricken down by a survivorship statute in regard to personal injury damages than by recognition of the right of action for death. In other words, if there is a statute in Florida, which there is, giving rise to a new action for death, and should there be no such statute in another State, for instance, South Carolina, certainly there would be a

940 lack of uniformity there, yet that lack of uniformity is not held to be in conflict with the

Constitution. Likewise, the survivorship of a personal injury damage is recognized by a Florida statute, and suppose the same is not recognized by a South Carolina statute. The same lack of uniformity exists, but in my opinion this lack of uniformity is not in conflict with the constitutional provisions of uniformity required of admiralty.

Notwithstanding the force of the argument with reference to the State statute giving the death claim as being supplementary legislation, and the survivorship action not being supplementary, which distinction I think exists, I am of the opinion and find that in principle the survivorship of an action in personam, under the circumstances in this case, should be recognized. In the first place, the Fifth Circuit Court of Appeals has held that the Florida survivorship statute should be liberally construed. *Brill vs. Jewett*, 262 Fed. 935. In the next place, cases have upheld State statutes applicable to maritime torts within the territorial limits of the State which pro-

vide for the creation of a right of action for death, as well as for the survivorship of personal injury actions. *Quinette vs. Bisso*, 186 Fed. 825. Here the Fifth Circuit Court of Appeals has upheld a Louisiana statute of such a nature.

The authorities do not sustain petitioner's contention. *The Belfast*, 135 Fed. 208, was an action in rem. In *The Amoth*, 3 F. (2) 848, it was recognized that if there was an applicable State statute, it would control. In *The Statler*, 31 F. (2) 707, there was an announcement by the Court of the law dealing with death on the high seas, but such announcement was not in conflict with the enforcement in admiralty of liability for maritime torts within territorial waters of a State, both as to the creation of a right of action for death, and survivorship in an action for damages. *The LaFayette*, 269 Fed. 917, is not in point, in that the New York statutes and decisions did not provide for survivorship. While the argument is ingenious, and the distinction pointed out is recognized, I conclude that the cause of action does not abate by reason of the death of Mr. Yeiser.

The above conclusions cover the findings on the points argued before me.

JOHN W. HOLLAND,  
United States District Judge.

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941      On December 13, 1938, the Claimants, Just and Gruner, filed NOTICE OF APPLICATION FOR SETTLEMENT OF FINAL DECREE.

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On April 25, 1939, Claimant, Anne Elise Gruner, filed her BILL OF COSTS and PRAECIPE FOR TAXING SAME.



On April 25, 1939, Claimant, Charlotte Cross Just, filed her BILL OF COSTS and PRAECIPE FOR TAXING SAME.

On April 25, 1939, FINAL DECREE was entered and filed in words and figures following, to-wit:

DECREE ADJUDGING LIABILITY AND DENYING  
LIMITATION THEREOF WITH FINDINGS OF  
FACT AND CONCLUSIONS OF LAW.

In the District Court of the United States for the Southern  
District of Florida, Miami Division.

942 In Admiralty—No. 147-M.

In the Matter of the Petition of Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., 'as Owner of the American yacht "Friendship II," for Limitation of Liability.

This cause having come on for trial directly before the Court upon the pleadings, and the Court having heard the testimony and evidence adduced on behalf of the petitioner and the claimants, Charlotte Cross Just and Anne Elise Gruner, and having thereafter heard and considered the arguments of proctors for the respective parties, and the Court having filed its memorandum opinion herein on the 30th day of April, 1938, finding that liability upon the part of the petitioner existed and that a denial of limitation of that liability should be decreed, the Court now makes the following findings in addition to and supplementing and confirming the findings contained in said opinion.

## Findings of Fact.

1. At the time the events herein set forth happened, the houseboat "Friendship II" was owned by Henry C. Yeiser, Jr. . It is a cruising houseboat yacht built in 1928, powered by twin gasoline motors and used solely for pleasure. Yeiser lived aboard, occupying a stateroom on the upper deck, and the boat and crew thereof were at all times under his immediate personal control and supervision when he was aboard the vessel.

2. The yacht was constructed with a double hull consisting of an inner and outer skin with a space between the outer and inner hulls opening directly into the bilge. The so-called master stateroom is located on the lower deck directly over the bilge and near the stern, and has a connecting private bath. There is a single bunk on each side of this stateroom. Each motor has its own separate exhaust pipe and the boat could operate under either or both of the motors. The exhaust pipes from the two motors pass through this bilge directly underneath these bunks and come out at the stern. The port and starboard walls of the master stateroom and of the bath formed a part of the inner hull. Each of these walls has a number of vents or openings in it so designed that air from the bilge could circulate through the space between the inner and outer hulls and into the stateroom. Through such direct communication from the bilge into the stateroom and bath any gases which might collect in the bilge could by their natural diffusion flow into the stateroom and bath through these vents. The only partition in the bilge is a bulkhead directly behind the engine room and forward of the cabins on the lower deck. This bulkhead was not watertight or airtight because of openings around the exhaust pipes and the propellor shafts. Water could

flow back and forth in the bilge under the engine room bulkhead.

3. In December, 1933, the boat, then named the "Amity," was surveyed for insurance purposes. As a result of this survey, two holes (one located in Cl.'s Ex. 5 and one in Cl.'s Ex. 6) were discovered in the port exhaust pipe and the surveyor recommended that the port exhaust pipe be renewed or repaired. The then owner desired to sell the boat and did not want to incur the expense of installing a new exhaust pipe so he instructed the Captain to repair the pipe if possible. The pipe was repaired to the satisfaction of the insurance surveyor on January 3, 1934, the holes being patched by means of a metal plug and a sleeve. In the first part of March, 1934, the Captain, then in command, discovered that still another hole had developed in the port exhaust pipe (about four feet from the rear end of Cl.'s Ex. 6) and his engineer put on a temporary patch by means of tape and copper wire. As a prospective purchaser, Yeiser, together with the Chief Engineer employed by him on the boat then owned by him, inspected 944 the "Friendship II." Yeiser asked the Captain about its condition and was told, among other things, that the port exhaust pipe should be renewed. The Captain left the vessel in May, 1934, and was not connected with it thereafter. About five weeks after his inspection, and some time in May, 1934, after the Captain had left the vessel, Yeiser bought it. After buying this vessel, Yeiser renamed it the "Friendship II." Yeiser owned another vessel named the "Friendship I." The man who owned the "Friendship I," and who sold it to Yeiser, was retained by him as Captain. This man also served as Captain aboard the "Friendship II" and the same Chief Engineer served on both vessels. The exhaust pipes on the "Friendship I" were located on the side of the vessel toward the aft and difficulty

was experienced because of exhaust gas blowing in over the after deck. In order to prevent the gas from coming in where passengers would be, Yeiser had the exhaust pipes on the side of the "Friendship I" changed so that they came up through the smoke stack. Yeiser was an engineer, a balloon pilot, a licensed airplane pilot, had made a study of boats, had owned several, had studied navigation, was studying to get a master's license, and had a knowledge of gasoline motors. After buying the "Friendship II," Yeiser experienced trouble because of exhaust gas on that vessel. Yeiser issued orders to his Captain to see that the after windows in the master stateroom of the "Friendship II" were always closed. While aware of the danger from the gas, Yeiser assumed that it was blowing in over the stern. On one occasion Yeiser's Chief Engineer and a fishing guide were both affected by carbon monoxide while they were cleaning fish over a latticed manhole in the after deck at the stern of the vessel. In September, 1935, Yeiser's two sons were overcome by carbon monoxide while they were in the master stateroom. Yeiser was aboard at the time and knew of that occurrence. As a result thereof, Yeiser repeated his orders to keep the rear windows closed and ordered his Engineer to inspect the exhaust pipes. The character of the examination which was made at that time was more or less superficial, at least it was not careful and sufficient enough to relieve Yeiser of the possibility

that damage was caused by leaking pipes emitting  
 945 gas into the bilge rather than coming from the  
 discharge outside of the boat being blown back  
 onto the yacht by the wind. A proper inspection would have disclosed the real condition of the pipes at that time and had their condition been definitely ascertained in September, 1935, it is reasonable to suppose that the condition in which they were in February, 1936, might have been anticipated. The condition which the insurance surveyor found in 1933, and which was repaired,

was made known to Mr. Yeiser and, as the owner of the yacht, he knew of the imperfect condition at one time of the exhaust pipe and that it was repaired. After September, 1935, no attempt was ever made to thoroughly inspect the exhaust pipes until after the claimants herein were injured. Yeiser was fully aware of the danger from carbon monoxide gas and of the dangerous condition existing in the master stateroom due to the tendency of carbon monoxide gas to enter that stateroom. He also knew of the likelihood of such gas continuing to enter that stateroom and that a tendency of carbon monoxide gas to enter the master stateroom constituted a dangerous condition. On many occasions after September, 1935, he talked about removing the exhaust pipes then in the boat and replacing them with exhaust pipes coming out of the dummy smoke stack on the upper deck because of the presence of carbon monoxide gas in the master stateroom. He took no active steps, however, to have this done until after the claimants herein were injured.

4. On Friday, February 28, 1936, claimants, Charlotte Cross Just and Anne Elise Gruner, at the invitation of Yeiser, were guests aboard the houseboat for a fishing trip and cruise from Miami, Florida, and return. They had gone aboard at Miami in the afternoon, before sailing and Yeiser assigned the master stateroom to them for their use during this trip. There was one other stateroom which was unoccupied and unused during the trip. The boat left Miami at about 5:30 P. M. and proceeded to Featherbed Shoals, arriving there shortly after dark, about eight o'clock. Neither of the claimants was in the stateroom assigned to them for any considerable period

946 of time until several hours after the motors had been stopped. The boat remained anchored at this place until about 6:30 o'clock the next morning, when it proceeded to Card Sound Cut, where it re-



remained at anchor while the party fished in small boats during Saturday and Sunday. At about 7:10 P. M. on Sunday, March 1, the motors were started and the boat proceeded back to Featherbed Shoals, where it arrived at about 9:10, and anchored until early in the morning and then, at about 6:50 A. M., proceeded toward Miami, arriving at about 9:10 A. M. Shortly before the boat reached Miami the claimants were discovered in an unconscious condition. The door to the bathroom was open but the windows in their stateroom and in the private bath opening into the stateroom were closed. While they were asleep in the stateroom which had been assigned to them, they were overcome, rendered unconscious and injuriously affected by carbon monoxide gas which had been permitted to escape from holes in the exhaust pipes into the stateroom. Yeiser, who was aboard and in personal charge of the yacht at all times during the trip, was immediately called and stated that he thought their condition was caused by carbon monoxide. The boat was at all times upon navigable waters of the United States and within the territorial boundaries of the State of Florida.

A few days after the claimants were injured, Yeiser died from causes unconnected with the accident, and claims were made against his estate for damages as a result of the injuries. Alma Chambers, as Executrix and as Ancillary Executrix of Yeiser's estate, filed her petition and libel in this Court claiming the right to limit liability, alleging that the injuries were occasioned without the privity and knowledge of Yeiser and also claiming exemption from liability upon the ground that the injuries were due wholly to an unforeseen and unavoidable accident. Monition was issued, proof of the respective claims of Mrs. Just and Miss Gruner was duly made, and both claimants filed separate answers denying and contesting the right to either exemption from or limitation of liability.

947        5. At the time the claimants were injured by the gas, the first section of the starboard exhaust pipe (Cl.'s Ex. 1) had numerous small holes in it. These holes were covered by ordinary tape which had worn through. This section of the exhaust pipe was in front of the engine room bulkhead. The center section of the port exhaust pipe (Cl.'s Ex. 5, 6) had two holes in it from which carbon monoxide gas could escape and, in my opinion, did escape. This section of the exhaust pipe was aft of the engine room bulkhead. In view of what is stated herein, and particularly in Paragraph numbered 3, Yeiser was charged with knowledge of a defective condition which existed at the time these claimants were injured and he should have realized that the use of the said stateroom by the claimants subjected them to an unreasonable risk. By his affirmative action in assigning the said stateroom to the claimants and in operating the yacht while they were in the stateroom, he failed to exercise ordinary care to avoid injuring them. As a direct and proximate result of Yeiser's negligence, the claimants were injured by breathing carbon monoxide gas which had collected in the stateroom assigned to them by Yeiser.

6. On March 1, 1936, and at the time the claimants were injured, the said yacht was unseaworthy in that the master stateroom was unsafe, the exhaust pipes of the said yacht were and had been a long time prior thereto defective and in such condition that a deleterious percentage of carbon monoxide gas was escaping therefrom into the bilge, and could, and I find did on that occasion, escape into the master stateroom. This gas, if the stateroom was unventilated, soon became dangerous to breathe.

When Henry C. Yeiser, Jr., assigned the said master stateroom to the claimants for their use, he knew, or from the facts known to him should have known, that

the said yacht was unseaworthy; that the said stateroom was unsafe and unfit for transportation of passengers occupying it; that the exhaust pipes were defective and in such condition that the carbon monoxide gas was escaping or would likely escape therefrom in dangerous quantities into the stateroom which he had assigned to the claimants.

948 7. The claimants' injuries were not due to an unforeseen and unavoidable accident but were occasioned with the privity and knowledge either direct or chargeable to Yeiser.

8. All findings of fact as stated in the conclusions of law herein found and the memorandum of the Court are incorporated in these findings of fact.

#### Conclusions of Law.

From the facts specifically found and set forth herein, and in the opinion heretofore filed herein, and from the evidence adduced by the parties, the Court concludes as matters of law, and therefore Orders, Adjudges and Decrees:

1. That it has jurisdiction of the subject matter, the res, and of all parties hereto in personam.

2. That Henry C. Yeiser, Jr., was guilty of actionable negligence in assigning to the claimants the said master stateroom aboard his yacht and operating the said yacht when he knew, or from the facts known to him should have known, (1) that the said yacht was unseaworthy; (2) that the said stateroom was unsafe; (3) that the use of it by the claimants subjected them to an unreasonable risk, and (4) that the exhaust pipes of said yacht were defective and in such condition that carbon monoxide

gas was escaping therefrom into the bilge, and could and did on this occasion escape into the stateroom which he had assigned to the said claimants and in which they were sleeping; and Yeiser was negligent in assigning claimants to this stateroom, without warning, into which gas was permitted to escape from the exhaust pipes of the said yacht. And the petitioner is liable to each of the said claimants for damages suffered by them as the proximate result of the said negligence.

949        3. That the several claimants' respective injuries were not due to an unforeseen and unavoidable accident, but on the contrary directly resulted from and were proximately caused by the negligence of Henry C. Yeiser, Jr.

4. That the said negligence resulting in the said injuries to the claimants, and each of them severally, was with the privity and knowledge of Henry C. Yeiser, Jr., within the meaning of the statutes conferring the right to limitation of liability; that the petitioner has failed to sustain the allegations of her petition and libel, and that the claimants and each of them have fully sustained by competent evidence the allegations of their respective answers; that the petitioner, as a matter of law and from the facts adduced before the Court, is not entitled to a decree limiting her liability as prayed for in her libel and petition, and that the said petition for limitation should be, and the same hereby is, denied.

5. That the petitioner is not entitled to an exemption from all liability, and that the relief so prayed for in the said petition and libel should be, and the same hereby is, denied.

6. That the several claimants' respective causes of action against Yeiser in personam did not abate as the

result of the death of said Henry C. Yeiser prior to the filing of the petition and libel herein seeking to exonerate his estate from liability and/or to limit that liability, but that said cause of action survives under Section 4211, Compiled General Laws, Florida, 1927:

7. That where personal injuries are negligently caused upon navigable waters of the United States and within the territorial limits of a State, and the tortfeasor thereafter dies, a State statute providing that the cause of action for such injuries shall survive will be enforced in personam in a Court of Admiralty; that the subject is maritime and local in character and the specified modification of or supplement to the rule applied in 950 Admiralty Courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony of that law in its international and interstate relations.

8. That the petitioner pay the cost of this proceeding; said costs to include, among other things, the expense of procuring photographs and the original exhaust pipes with all moving and storage charges thereon, and Court Reporter's fees, and that the claimant, Charlotte Cross Just, do have and recover of and from the said petitioner, Alma Chambers, as Executrix and as Ancillary Executrix of the Estate of Henry C. Yeiser, Jr., and her stipulator, Maryland Casualty Company, a Maryland corporation, her said costs herein taxed in the sum of \$244.50, and that the said claimant, Anne Elise Gruner, do have and recover of and from the said petitioner, Alma Chambers, as Executrix and as Ancillary Executrix of the Estate of Henry C. Yeiser, Jr., her said costs herein taxed in the sum of \$356.78, and that execution therefor shall issue in due course.



9. That this cause be set for hearing before this Court for submission of further proofs upon the issues and questions of damages sustained by each of the claimants herein with all convenient speed after due notice to the respective parties unless an appeal be duly taken herefrom pursuant to law.

Done and ordered at Miami, Florida, this 25th day of April, A. D. 1939.

JOHN W. HOLLAND,  
United States District Judge.

11/em1/6

4/21/39.

951 On May 8, 1939, Libelant filed her PETITION FOR ALLOWANCE OF APPEAL, which said Petition, together with the Court's allowance of the said Appeal, is in words and figures following, to wit:

In Admiralty, No. 147-M.

(Title Omitted.)

#### PETITION FOR ALLOWANCE OF APPEAL

To the Honorable John W. Holland, Judge of the District Court of the United States for the Southern District of Florida:

The above-named, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., deceased, appellant, deeming herself to be aggrieved by the decree entered in the matter of the American Yacht Friendship II, in Admiralty, said decree being dated April 25, 1939, wherein the District Court denied the petitioner exemption from lia-

bility to the claimants herein as set forth in said decree, and wherein the said District Court held that the appellant was not entitled to the benefit of the Act of Congress limiting the owner's liability to the value of the vessel, as provided by Section 183 and 188, U. S. C. A., Title 46, and wherein the said District Court held the petitioner liable for the claimants' alleged damages and prays that an appeal may be allowed, and that a transcript of the record, proceedings and papers, upon which the said decree was entered, duly authenticated, may  
 952 be sent to the United States Circuit Court of Appeals.

KIRLIN, CAMPBELL, HICKOX,  
 KEATING & McGRANN,  
 New York, N. Y.,

and

LOFTIN, CALKINS & ANDER-  
 SON,

Miami, Fla.

RAYMOND PARMER,

By B. R. COLEMAN,

Doctors for the Appellant.

953. State of New York,  
 County of New York, ss.

Raymond Parmer, being duly sworn, says that he is a member of the firm of Kirlin, Campbell, Hickox, Keating & McCrann, attorney and agent for Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., appellant in the above-mentioned cause; that he is authorized to make and does make this affidavit for and on behalf of and in the name of the said Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., the petitioner in the foregoing petition, and he says that he has read the foregoing petition and knows the contents thereof and that the allegations therein are true, and that the appeal sought in the said petition is not

taken for the purpose of delay but because the said Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., and deponent believes that an injustice would be done by said decree if carried into effect.

RAYMOND PARMER.

Sworn to and subscribed before me this May 5th, 1939.

(N. P. Seal)

SAMUEL L. ALBARINO,

Notary Public, State of New  
York.

SAMUEL L. ALBARINO,

Notary Public, Queens County.

Queens Co. Clerk's No. 221, Reg. No. 2994.

N. Y. Co. Clerk's No. 347, Reg. No. OA243.

Kings Co. Clerk's No. 86, Reg. No. 276.

Commission expires March 30, 1940.

The appeal herein is hereby allowed this May 8th,  
1939.

JOHN W. HOLLAND,

U. S. D. J.

954 On May 8, 1939, the Libelant filed her AS-  
SIGNMENTS OF ERRORS in words and figures  
following, to wit:

In Admiralty, No. 147-M.

(Title Omitted.)

#### ASSIGNMENT OF ERRORS.

Now comes Alma Chambers, as Executrix of the Es-  
tate of Henry C. Yeiser, Jr., as owner of the American

yacht "Friendship II" by her undersigned proctors and assigns as the errors upon which she intends to rely in the United States Circuit Court of Appeals for the Fifth Circuit for the reversal of the interlocutory order and decree of the District Court dated April 25, 1939, and recorded in Minute Book 19 at page 171 of the records of the said District Court:

1. The District Court erred in entering its said decree dated April 25, 1939.

2. The District Court erred in failing to enter a decree for the Petitioner adjudging that Henry C. Yeiser, Jr., owner of the yacht "Friendship II" and the Petitioner as Executrix of his estate were not liable for any demand or claim whatsoever in consequence of the claims of Charlotte Gross Just and Anne Elise Gruner.

3. The District Court erred in finding, with respect to the facts, as follows:

955 A. That as a result of a survey held in December 1933 two holes were discovered, one of which was located in claimants' Exhibit 5, and the other in claimants' Exhibit 6.

B. That the then owner did not wish to incur the expense of installing a new exhaust pipe and so instructed the Captain of the vessel to repair the pipe, if possible.

C. That the said holes in the pipe were patched by means of a metal plug and a sleeve.

D. That in March 1934 the Captain of the vessel discovered a hole which was about four feet from the rear end of claimants' Exhibit 6.

E. That Yeiser, as a prospective purchaser, together with the chief engineer employed by him inspected the "Friendship II".

F. That Yeiser was told by the captain of the vessel, among other things, that the port exhaust pipe should be renewed; and that Yeiser was told by the captain of the vessel that the condition found by Captain Patton in 1933 had been repaired and is charged with knowledge of the possibility of a reoccurrence.

G. That Yeiser bought the vessel about five weeks after the time that he inspected the vessel.

H. That Yeiser issued orders to the captain of the "Friendship II" to see that the after windows in the master stateroom of the "Friendship II" were always closed.

I. That Yeiser, while aware of the danger from the gas, assumed that it was blowing in over the stern.

J. That Yeiser's chief engineer and a fishing guide were affected by carbon monoxide gas while they were cleaning fish over a latticed manhole on the after deck at the stern of the vessel.

K. That in September 1935 Yeiser's two sons were overcome by carbon monoxide while they were in the master stateroom.

L. That as a result of what happened to Yeiser's two sons Yeiser repeated his orders to keep the rear windows closed.

M. That the examination made by the chief engineer was more or less superficial, and that it was not careful and sufficient enough.



N. That Yeiser knew that the exhaust pipes had been in an imperfect condition in 1933 and that this condition had been repaired.

O. That Yeiser was aware that a dangerous condition existed in the master stateroom due to the tendency of carbon monoxide gas to enter that stateroom.

P. That Yeiser knew of the likelihood of carbon monoxide gas continuing to enter the master stateroom and that a tendency of carbon monoxide gas to enter the master stateroom constituted a dangerous condition.

Q. That on many occasions after September 1935 Yeiser talked about removing the exhaust pipes then in the boat and replacing them with exhaust pipes coming out of dummy smoke stacks on the upper deck because of the presence of carbon monoxide gas in the master stateroom.

R. That Yeiser assigned to claimants, Just and Gruner, the master stateroom for their use during the trip.

S. That there was one other stateroom which was unoccupied and unused during the trip.

T. That on the morning of March 2nd, shortly before the vessel reached Miami, the claimants were discovered in an unconscious condition.

U. That while the claimants, Just and Gruner, were asleep in the stateroom which had been assigned to them they were overcome, rendered unconscious and injuriously affected by carbon monoxide gas which had been permitted to escape from holes in the exhaust pipes into the stateroom.

V. That at the time the claimants were injured by gas claimants' Exhibit 1 had numerous small holes in it, which holes were covered with ordinary tape which had worn through.

W. That the center section of the port exhaust pipe, claimants' Exhibits 5 and 6, had two holes in it from which carbon monoxide gas could and did escape.

X. That the manner of attention given to the claimants on the yacht after they were discovered indicates that their condition was caused by carbon monoxide poisoning.

Y. That Mr. McKay, together with Mr. Yeiser and members of the crew, treated the case as one of gas poisoning.

Z. That the amount of drinking done by the claimants was not sufficient to cause unconsciousness.

AA. That Mrs. Just's condition was indicated on the hospital records as gas poisoning rather than alcoholism and that she was so treated in the hospital.

BB. That it is reasonable to suppose that if the real condition of the pipes had been ascertained in September 1935 their condition in February 1936 might have been anticipated.

CC. That the real condition of the pipes was not definitely ascertained in September 1935.

DD. That there was a possibility that the pipes were leaking in September 1935.

EE. That the claimants were not licensees.

FF. That in September 1935 Yeiser had a duty to ascertain what the condition of the pipes was in February 1936.

4. The District Court erred in finding that Henry C. Yeiser, Jr., was charged with the knowledge that a defective condition of the exhaust pipes existed at the time the claimants were injured.

5. The District Court erred in finding that Henry C. Yeiser, Jr., should have realized that the use of the after stateroom by the claimants subjected them to an unreasonable risk.

6. The District Court erred in finding that Henry C. Yeiser, Jr., by his affirmative action in assigning the after stateroom to the claimants and in operating the yacht while they were in the stateroom, failed to exercise ordinary care to avoid injuring them.

7. The District Court erred in finding that as a direct and proximate result of Henry C. Yeiser, Jr.'s negligence the claimants were injured by breathing carbon monoxide gas in the stateroom assigned to them by Mr. Yeiser.

8. The District Court erred in finding that on March 1, 1936, and at the time the claimants were injured, the yacht was unseaworthy in that the master stateroom was unsafe, the exhaust pipes of the yacht were and had been for a long time prior thereto defective and in such condition that a deleterious percentage of carbon monoxide gas was escaping therefrom into the bilge, and could and did on that date escape into the master stateroom.

9. The District Court erred in finding that when Henry C. Yeiser, Jr., assigned the master stateroom to

the claimants for their use he knew or from the facts known to him should have known that the yacht was unseaworthy.

10. The District Court erred in finding that when Henry C. Yeiser, Jr. assigned the said master stateroom to the claimants, he knew, or from the facts known to him should have known, that the stateroom was unsafe and unfit for transportation of passengers occupying it.

959 11. The District Court erred in finding that when Henry C. Yeiser, Jr. assigned the said master stateroom to the claimants, he knew, or from the facts known to him should have known, that the exhaust pipes were defective and in such condition that carbon monoxide gas was escaping or would likely escape therefrom in dangerous quantities into the stateroom which he had assigned to the claimants.

12. The District Court erred in finding that the claimants' injuries were not due to an unforeseen or unavoidable accident but were occasioned with the privity and knowledge either direct or chargeable to Henry C. Yeiser, Jr.

13. The District Court erred in not finding as facts the following:

Yeiser was by reason of alcoholism incompetent and the control of his effects had been taken from him and given to a guardian appointed by the Court of Ohio (McKay, 38, 39). The Friendship II left Miami at about 5:30 P. M. on Friday, February 28th and arrived at Featherbed Shoals which are about fourteen miles from Miami at about 8:10 P. M. on the same day. The vessel remained at anchor for the night and on the morning of

Saturday, February 29th, at about 6:50 A. M. proceeded a further distance of about nine miles to Card Sound, where she arrived at 8:30 A. M. The vessel remained at anchor at Card Sound during Saturday, February 29th, and Sunday, March 1st, up to 7:30 P. M., when she proceeded on the return trip to Featherbed Shoals. She arrived at Featherbed Shoals at about 9:15 P. M. Sunday, and anchored. On Monday morning, at about 8:50 A. M., the vessel proceeded from Featherbed Shoals to Miami where she arrived at 9:10 A. M. On Saturday morning between 6:50 A. M. and 8:30 A. M., while the vessel was proceeding from Featherbed Shoals to Card Sound, claimants, Just and Gruner, occupied the master state-room (Roberts, 565). They arose at some time subsequent to the vessel's anchoring at 8:30 (Roberts, 565).

960 Neither of the claimants were affected by motor fumes during the trip from Featherbed Shoals to Card Sound (Roberts, 565), or otherwise made ill (Roberts, 565). On Saturday and Sunday, while the vessel was anchored at Card Sound, Mrs. Just and Miss Gruner went fishing in small boats (McKay, 22). On Sunday-afternoon the waters were very rough and both claimants became seasick. Mrs. Just was more seasick than Miss Gruner. She was green in the face and vomited (McKay, 55, 56, 75), (Roberts, 544). She was advised to take some medicine and she said that she would (Roberts, 545). Accordingly, both claimants returned to the Friendship II where they first had a drink of brandy and then had dinner (McKay, 41). After returning to the vessel, the claimants did not complain further of suffering from seasickness (McKay, 75). After dinner the claimants sat in the living room playing bridge and then sat on the after deck for an hour or two (McKay, 27). After that they left Mr. Yeiser and Mr. McKay, saying that they were tired, and they were not seen again until the next morning when they were found by Mr. McKay in their beds in the master state-



room (Mr. McKay, 27). On Monday morning, while the vessel was on its return trip to Miami, and about an hour before it arrived there, Mr. McKay opened the door to the master staterooms where the claimants then were lying in their beds (McKay 28), (Roberts, 549). At the time that he did so all the windows in the stateroom and also the windows in the private bathroom connecting with the stateroom were closed (McKay, 29). Mr. McKay then entered the room (McKay, 28). When he did so there was not any unusual or peculiar odor and there was not any unusual color to the atmosphere in the room. There was not any smoke or fumes visible in the master stateroom (McKay, 87, 88). The conditions were such as to cause Mr. McKay to conclude that because of the closed doors and windows the supply of oxygen was insufficient, (McKay, 74, 88, 89). While Mr.

McKay was in the room the claimants did not  
961 respond to him either when he spoke to them

or when he shook them (McKay, 28, 29). Both claimants were breathing naturally, but Mrs. Just's mouth hung down a little unnaturally (McKay, 28, 29). Other than this Mr. McKay did not notice the details of their appearance (McKay, 70). Mr. Yeiser was called to the room and tried to waken the claimants, but they did not awaken (McKay, 29). Each claimant was carried to the upper deck (McKay, 29). Mrs. Just was put on a couch on the after deck (Roberts, 552, 553). Miss Gruner was put on a bed in Mr. Yeiser's room (Roberts, 552). A physician, Dr. Howell, was called to attend them and he arrived within a half hour after the vessel docked (Roberts, 554). A nurse came also. While Miss Gruner was being carried upstairs, her head bumped against something. She then mumbled something. (Roberts, 552). A few minutes after being brought to the upper deck and before the doctor arrived, Miss Gruner was talking (Roberts, 555). When the doctor first examined her, her face was pale and the skin around her mouth was bluish

(Howell, 247). There was not any redness on the skin of her face (Howell, 247). Dr. Howell gave Miss Gruner a hypodermic injection of caffeine sodium benzoate and at that time she made an audible and intelligible remark to the physician (Howell, 246). After that and during the morning while the physician was attending her, she talked some more (Howell, 248). The physician also administered to Miss Gruner a mixture of oxygen and carbon dioxide. The physician left Miss Gruner at about 2:00 o'clock in the afternoon in order to bring Mrs. Just to the hospital. He returned later in the afternoon and found Miss Gruner in Mr. Yeiser's bed and instructed her to leave the vessel. She said she would not leave and that she was going to spend the night on the vessel (Howell, 287). During the afternoon and 962 while she was in Mr. Yeiser's room she was drinking something from a glass (Roberts, 559). The nurse who had come aboard in the morning remained until 5:00 P. M. when her place was taken by another nurse (Ollis, 667). The latter nurse found Miss Gruner still lying in Mr. Yeiser's bed (Ollis, 668). From 6:00 until about 10:00 P. M. nurse Ollis served Miss Gruner three or four drinks of liquor (Ollis, 668). Nurse Ollis requested claimant Gruner to leave the vessel and Miss Gruner said she did not wish to do so. (Ollis, 669). Miss Gruner was escorted from the vessel by the vessel's captain and Mr. McKay (Ollis, 669), (Roberts, 560). The nurse who attended in the morning and who went off duty at 6:00 P. M. was dead at the time of the trial (Howell, 247). After leaving the vessel and on the same night, Miss Gruner was examined by Dr. Foxworthy at the home of Mrs. Just (Foxworthy, 169). At that time she said she was perfectly all right and did not need any medicine (Foxworthy, 169). Dr. Foxworthy found that she was excited, that her heart was faint, that her respiration was fast and that her reflexes were exaggerated and she had the same symptoms as he

had previously found on his examination of claimant Just, except that they were in milder form (Foxworthy, 169). When Dr. Howell first attended Mrs. Just on the vessel she rolled over and looked up at him (Roberts, 556). Her complexion was pale but around her mouth there was a bluish discoloration (Howell, 247). There was not any redness on the skin of the face (Howell, 247). The physician gave her a hypodermic injection of caffeine sodium benzoate of  $7\frac{1}{2}$  grains (Howell, 245). When the doctor first attempted to give the injections Mrs. Just pulled her arm back and objected (Howell, 245). She also pulled the covers over her arm (Howell, 246). Within a half hour after the physician arrived he administered to Mrs. Just a mixture of carbon dioxide and oxygen (Howell, 249). When the physician attempted to administer this to Mrs. Just she moved her head away from the oxygen funnel and her head had to be steadied in order to make her breathe the mixture (Howell, 250). During the same morning, while the physician was there, Mrs. Just vomited into a basin held by the nurse (Howell, 251). She directed the vomitus away from her person and did not soil her bed clothes (Howell, 253). Mrs. Just did not talk to the physician, but she acted resistantly to what he was doing for her treatment (Howell, 249). At the times that the physician saw her on the vessel she was, in his opinion, semi-conscious (Howell, 370). In the afternoon at about 2 o'clock Mrs. Just was taken to St. Francis hospital at Miami Beach in an ambulance and Dr. Howell accompanied her (Howell, 256, 305, 306). Mr. McKay first thought that claimants were suffering from a lack of oxygen (McKay 74, 88, 89). Thereafter, and before the arrival of Dr. Howell, Mr. McKay and Mr. Yeiser conferred and expressed the opinion that claimants might be suffering from carbon monoxide poisoning (McKay, 31, 32, 33). Neither Mr. McKay nor Mr. Yeiser had had medical training. Mr. Yeiser said that the reason

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he thought that it was carbon monoxide poisoning was that the vessel's motors had been running that morning (McKay, 935). When Dr. Howell came to the vessel Mr. Yeiser informed him that he thought it was a carbon monoxide case because the motors were running that morning (McKay, 35). Mr. McKay also informed Dr. Howell that the cases involved carbon monoxide gas (Howell, 244). Dr. Howell accepted the statements which Mr. Yeiser and Mr. McKay made to him and ordered brought to the vessel a tank of oxygen and carbon dioxide (Howell, 249; 256, 302.) As a result of what he had been told and what he found he believed that both claimants were suffering from carbon monoxide poisoning (Howell, 256, 363). Accordingly, he treated them for that on the vessel (Howell, 302). At the same time he believed there was a great probability of alcoholism (Howell, 256, 363). When the doctor brought Mrs. Just to the hospital he recorded in the hospital record that her chief complaint was "apparent CO<sup>2</sup> poisoning", that the "working diagnosis" was "CO<sup>2</sup> poisoning and that his "impression" was "CO<sup>2</sup> poisoning." In using the symbol CO<sup>2</sup> he meant to describe carbon monoxide gas. He also recorded that he found Mrs. Just on the vessel in a semi-unconscious condition; that she had moderate cyanosis, increased respiration, rapid pulse and that he had received a history, i. e., he had been told, of her "apparently being overcome by fumes from the boat's engines." After writing the words "semi-unconscious" he drew a line through the word "semi." He then proceeded to give Mrs. Just treatment which he believed was efficacious in treating alcoholism (Howell, 257, 258). At about 4:00 P. M., and in the absence of Dr. Howell, Mrs. Just was seen in the hospital by Dr. Foxworthy (Foxworthy, 162). Dr. Foxworthy was a personal friend of Mrs. Just's and he was known to her as "Uncle Frank" (Foxworthy, 160). Before he saw her in the hospital he had been told that



she had been gassed (Foxworthy, 163). The symptoms that he observed were unconsciousness, a weak pulse, weak respiration, a cold and clammy skin, which had an ashen and a bluish color (Foxworthy, 163, 166). He was of the opinion that she was then at a later stage of a previous carbon monoxide poisoning (Foxworthy, 166).

965 Dr. Harris, who examined Mrs. Just between 8:00 and 9:00 P. M. (Harris, 773) found that on physical examination she was essentially normal (Harris, 773). He was not able as a result of his examination alone to determine what was the cause of her then condition (Harris, 773). He had been informed that it was suspected that Mrs. Just had been exposed to carbon monoxide gas (Harris, 776). On being so informed he was of the opinion that she had probably suffered from carbon monoxide poisoning (Harris, 724). A diagnosis of carbon monoxide poisoning was not actually confirmed, but in view of the history, carbon monoxide poisoning was suspected (Harris, 778). Therefore, he gave her treatment on the assumption that she had been poisoned by carbon monoxide gas (Harris, 779, 782). He was also informed that there was a possibility that the patient's condition was due to alcohol (Harris, 775). He saw no signs of alcohol on the patient at the time of his examination (Harris, 778). He was of the opinion that alcohol also might have been responsible for the condition in which he found Mrs. Just (Harris, 780). On the day following the return of the vessel to Miami, one Roderick went on board the vessel in order to estimate the cost of running the vessel's exhaust pipes out through the vessel's smoke stack instead of through the bilges as they then were (Roderick, 93). While on the vessel he and the Chief Engineer examined the existing exhaust pipes in order to see if there was anything wrong with them (Roderick, 94). They first examined the exhaust pipes without the motors running. There was no noticeable leak or apparent place where there had been a



leak (Roderick, 94). The starboard engine was then started and Roderick looked at the starboard exhaust pipe. There was no sign of any leak whatsoever (Roderick, 95). The port engine was then started (Roderick, 95), and when this was done water and motor  
 966 fumes came from a hole in the pipe. This was the only hole discovered in the port exhaust pipe (Roderick, 95). It was situated in that part of the port exhaust pipe which was under the forward corner of the port stateroom (Roderick, 95), and was about four feet from one end of Exhibit 6 (Roderick, 95, 98). Roderick also found another place in the port exhaust pipe where there was a plug. It was leaking water only in a slow drip. Motor fumes were not coming from this place (Roderick, 98, 99). This place was about two and one-half feet from the other end of Exhibit 6 (Roderick, 102). Roderick took out the plug and covered the resulting hole with a rubber patch and clamp (Roderick, 97). He also put a similar rubber patch over the hole at the other end of Exhibit 6 (Roderick, 97). Blood that has merely lost its oxygen and is in the veins takes on a bluish tint and causes a bluish color of the skin called cyanosis (Henderson, 18). Blood in which carbon monoxide has displaced oxygen by combining with the haemoglobin has a bright cherry red color and is much brighter than arterial blood (Henderson, 18). It causes the skin to be red in color (Howell, 367, 368), (Foxworthy, 223, 224). They may also have red spots on the skin (Foxworthy, 222, 223). Cyanosis or a bluish color or tinge of the skin is not produced by carbon monoxide poisoning (Henderson, 18). Thirty percent saturation of blood with carbon monoxide gas is not sufficient to cause unconsciousness (Henderson, 5, 6).

14. With regard to Yeiser's knowledge, both actual and constructive, the District Court erred in not finding as facts the following:

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Yeiser did not have actual knowledge at any time prior to March 2nd that the exhaust pipes were in a dangerous condition or were likely to be in such dangerous condition. Prior to March 2nd, 1936 Yeiser knew of only one occasion when motor fumes had entered the master stateroom, and that was in September 1935. He concluded that this was caused by motor fumes coming from the exhaust outlet over the stern of the vessel and through open windows. He was correct and justified in this conclusion and acted as a reasonably prudent man in so concluding. The same thing had occurred on another vessel which Yeiser had owned. There was nothing with respect to the pipes in September 1935 which indicated that they were then leaking or would likely leak in the future. The exhaust pipes carried water and when leaking water would leak from them. When the chief engineer inspected the pipes in September 1935 he used the same method of inspection as was used following March 2, 1936 by Roderick. At the time of Roderick's inspection following March 2, 1936, water and gas were leaking from a hole in one of the pipes. At the time of the chief engineer's inspection in September 1935 the pipes were not leaking water or gas.

Previous to September 1935 Yeiser had not been informed by anyone, nor was there any other reason for his knowing, that at the time that he purchased the vessel, and thereafter, there was any leak in the exhaust pipes or anything about them made it likely that they would leak in the future. Previous to the time of the purchase of the vessel Yeiser had not been informed that the exhaust pipes were leaking or that there was anything about them which made it likely that they would leak in the future.

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15. The District Court erred in finding as a conclusion of law that Henry C. Yeiser, Jr. was guilty of actionable negligence in assigning to the claimants the Master stateroom aboard his yacht and operating the said yacht when he knew or from the facts known to him should have known, (1) that the said yacht was unseaworthy; (2) that the stateroom was unsafe; (3) that the use of the stateroom by the claimants subjected them to an unreasonable risk, and (4) that the exhaust pipes of the yacht were defective and in such condition that carbon monoxide gas was escaping therefrom into the bilge and could and did on this occasion escape into the stateroom which Henry C. Yeiser, Jr. had assigned to the claimants and in which they were sleeping.

16. The District Court erred in finding as a conclusion of law that Henry C. Yeiser, Jr. was negligent in assigning the claimants to the master stateroom, without warning, into which gas was permitted to escape from the exhaust pipes of the yacht.

17. The District Court erred in finding as a conclusion of law that the petitioner, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., is liable to each of the claimants, Charlotte Cross Just and Anne Elise Gruner for damages suffered by them as a proximate result of the alleged negligence of Mr. Yeiser.

18. The District Court erred in finding as a conclusion of law that the several claimants' respective injuries were not due to an unforeseen and unavoidable accident, but on the contrary directly resulted from and were proximately caused by the negligence of Henry C. Yeiser, Jr.

19. The District Court erred in finding as a conclusion of law that the negligence resulting in the injuries

to the claimants and each of them severally, was with the privity and knowledge of Henry C. Yeiser, Jr. within the meaning of the statutes conferring the right to limitation liability.

20. The District Court erred in finding as a conclusion of law that the petitioner failed to sustain the allegations of her petition and libel, and that the claimants and each of them have fully sustained by competent evidence the allegations of their respective answers.

969 21. The District Court erred in finding as a conclusion of law that the petitioner, as a matter of law and from the facts adduced before the Court, is not entitled to a decree limiting her liability as prayed for in her libel and petition.

22. The District Court erred in finding as a conclusion of law that the petition for limitation should be denied.

23. The District Court erred in finding as a conclusion of law that the petitioner is not entitled to an exemption from all liability and denying the relief prayed for in the petition and libel.

24. The District Court erred in finding as a conclusion of law that the respective causes of action of the claimants against Henry C. Yeiser, Jr. in personam did not abate as a result of the death of the said Henry C. Yeiser, Jr., prior to the filing of the petition and libel seeking to exonerate his estate from liability and/or to limit that liability.

25. The District Court erred in finding as a conclusion of law that the cause of action of the claimants survived under Section 4211, Compiled General Laws of Florida 1927.

26. The District Court erred in finding as a conclusion of law that where personal injuries are negligently caused upon navigable waters of the United States and within the territorial limits of a State, and the tortfeasor thereafter dies, a State statute providing that the cause of action for such injuries shall survive, will be enforced in personam in a Court of Admiralty.

27. The District Court erred in finding as a conclusion of law that where personal injuries are negligently caused upon navigable waters of the United States and within the territorial limits of a State, and the tortfeasor thereafter dies, that the subject is maritime and local and in character and specified modification of or supplement to the rule applied in Admiralty Courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony of that law in its international and interstate relations.

28. The District Court erred in finding as a conclusion of law that the claimant, Charlotte Cross Just should have and recover of and from the petitioner, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr. and her stipulator, Maryland Casualty Company, for costs taxed in the sum of \$244.50.

29. The District Court erred in finding as a conclusion of law that the Claimant, Anne Elise Gruner, should have and recover of and from the petitioner, Alma Chambers, as Executrix and as Ancillary Executrix of the Estate of Henry C. Yeiser, Jr., costs taxed in the sum of \$356.78.

30. The District Court erred in finding as a conclusion of law that this cause should be set for hearing before the District Court for submission of further



proofs upon the issues and questions of damages sustained by each of the claimants.

(31. The District Court erred in failing to find that if Yeiser was liable to the claimants his liability in personam ended at the time of his death.

32. The District Court erred in failing to find that the claimants were gratuitous licensees and as to them had no duty to make the vessel safe or to inspect the vessel to discover possible, or even probable, dangers.

33. The District Court erred in failing to enter a decree in favor of the petitioner, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., filed on April 25, 1939, adjudging that the alleged accident to the claimants did not occur with the privity and knowledge of Henry C. Yeiser, Jr., within the meaning of the statutes conferring the right to limitation of liability.

34. The District Court erred in not finding and decreeing that the claimant, Charlotte Cross Just, failed to sustain by competent evidence the allegations of her claim and answer filed on October 23, 1936.

35. The District Court erred in not finding and decreeing that the claimant, Anne Elise Gruner, failed to sustain by competent evidence the allegations of her claim and answer filed on October 23, 1936.

36. The District Court erred in not finding and decreeing as a matter of law and from the facts adduced before the Court, that the petitioner, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., is entitled to a decree limiting her liability as prayed for in her libel and petition filed on.

37. The District Court erred in not finding and decreeing that if he found that Henry C. Yeiser, Jr., was liable for any demand or claim whatsoever in consequence of the claims of Charlotte Cross Just and Anne Elise Gruner, that the said Henry C. Yeiser, Jr., and the petitioner, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., should be discharged from said liability by the surrender of the said yacht and the limitation of their liability to its value.

B. R. COLEMAN,  
 RAYMOND PARMER,  
 For Kirlin, Campbell, Hickox,  
 Keating & McGrann.  
 and  
 LOFTIN, CALKINS & ANDER-  
 SON,  
 Proctors for Petitioner-Appellant.

We acknowledge receipt of a copy of the foregoing Assignments of Errors, this May 8th, 1939.

FORDYCE, WHITE, MAYNE,  
 WILLIAMS & HARTMAN,  
 St. Louis, Missouri.  
 and  
 EVANS, MERSHON & SAW-  
 YER,  
 Miami, Florida.

By W. O. MEHRTENS,  
 Proctors for the Appellees.

On May 8, 1939, the Libelant filed NOTICE OF APPEAL together with RECEIPT of Proctors for the Claimants, in words and figures following, to wit:

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## NOTICE OF APPEAL.

In the District Court of the United States for the Southern District of Florida, Miami Division.

In Admiralty, No. 147-M.

In the Matter of the Petition of Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., as Owner of the American Yacht Friendship II, for Limitation of Liability.

To: Evans, Mershon & Sawyer and Fordyce, White, Mayne, Williams & Hartman, Proctors for Claimants, Charlotte Cross Just and Anne Elise Gruner:

Please take notice that the petitioner, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, from that certain interlocutory decree entered herein on April 25, 1939, which denies the petitioner exemption from liability for the alleged injuries of the claimants, Charlotte Cross Just and Anne Elise Gruner, and which also holds that the Petitioner is not entitled to the benefit of the Act of Congress limiting her liability to the value of the vessel and that

974 petitioner is liable to the said claimants for their damages.

Dated at Miami, Florida, this May 8, 1939.

KIRLIN, CAMPBELL, HICKOX,  
KEATING & McGRANN,  
New York, N. Y.,  
and

LOFTIN, CALKINS & ANDER-  
SON,  
Miami, Florida.

RAYMOND PARMER,  
By B. R. COLEMAN,  
Proctors for the Petitioner.

Received a copy of the foregoing notice this May 8th,  
1939.

FORDYCE, WHITE, MAYNE,  
WILLIAMS & HARTMAN,  
St. Louis, Missouri,  
and

EVANS, MERSHON & SAW-  
YER,  
By W. O. MEHRTENS,  
Proctors for the Claimants.

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On May 8, 1939, the District Judge entered an Order  
EXTENDING THE TIME TO FILE THE TRANSCRIPT  
OF THE RECORD TO JULY 11, 1939, the original of  
which said Order has been transmitted to the Clerk of the  
Circuit Court of Appeals:

On May 8, 1939, CITATION ON APPEAL was issued,  
the Original of which has been transmitted to the Clerk  
of the Circuit Court of Appeals.

On July 5, 1939, the District Judge entered an Order EXTENDING THE TIME TO FILE THE TRANSCRIPT OF THE RECORD TO AUGUST 3, 1939, the original of which Order has been transmitted to the Clerk of the Circuit Court of Appeals.

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ORDER CERTIFYING ORIGINAL EXHIBITS TO THE APPELLATE COURT.

In the District Court of the United States for the Southern District of Florida, Miami Division.

Order Certifying Original Exhibits to C. C. A. Filed Aug. 2nd, 1939.

In Admiralty, No. 147-M.

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Filed Miami, Fla., Jul. 20, 1939.

Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., as Owner of the American Yacht "Friendship II" for Limitation of Liability, Appellant, vs. Charlotte Cross Just and Anne Elise Gruner, Appellees.

Upon application of Loftin, Calkins & Anderson, of counsel for the Petitioner-Appellant, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., as owner of the American Yacht "Friendship II", in the above-entitled cause, this matter was heard for the purpose of completing the transcript of the record for use on the appeal heretofore entered in this cause.

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This Court is of the opinion that it is necessary and proper that the following original exhibits introduced in



evidence in said cause should be inspected in the United States Circuit Court of Appeals for the Fifth Circuit upon the said appeal, to wit:

Claimants' Exhibits 1 to 6 (6 pieces of pipe).

Claimants' Exhibits 1 (7) and 2 (8), (photographs of Yacht).

Claimants' Exhibits 9-A to 9-L, (Hospital Records), Personal History signed by Dr. Spencer Howell).

Claimants Exhibit No. 12 for identification (Letter dated October 8, 1936, from John K. Woolslair to Captain Fred E. Roberts).

976 Claimants' Exhibit No. 13 for identification (Copy of letter dated Jan. 3, 1934, addressed to Appleton & Cox, Atlanta, Georgia, concerning repairs to Yacht).

Petitioner's Exhibit No. 1, (Diagram showing Exhaust Pipe and hole).

Petitioner's Exhibit No. 2, (Log Book entries).

Petitioner's Exhibit No. 3, (Sketch of Yacht).

Petitioner's Exhibits Nos. 4-A and 4-B, (Charts).

Petitioner's Exhibit No. 5, (Measurements of Yacht Friendship II prepared by Captain J. N. Patton).

Petitioner's Exhibits Nos. 6-A, 6-B, and 6-C, (Photostatic copies of Bills for provisions).

Petitioner's Exhibit No. 7 (Sample of signature).

Petitioner's Exhibit No. 8 (Letter dated January 27, 1934, addressed to William Gardner & Company, New York, N. Y., and signed Captain W. D. Archer).

• It Is, Therefore, Ordered that the Clerk of this Court shall safely keep the said original exhibits until the transcript of the record is forwarded to said Appellate Court, and thereupon, shall attach his authentication certificate to each of said original exhibits and send the same, by United States Mail, to the Clerk of the said Appellate Court, at New Orleans, Louisiana; except that Claimants' Exhibits Nos. 1 to 6, the same being pieces of the exhaust pipe, shall be retained by the Clerk of this Court to be available to Counsel in preparing briefs, and forwarded to the Clerk of the Circuit Court of Appeals after all briefs have been filed in that Court; the said original exhibits to be returned to the Clerk of this Court upon final disposition of the said appeal in the said Appellate Court.

• It Is Further Ordered that this Order be transmitted to the said Circuit Court of Appeals with the said exhibits.

• Ordered and done at Miami, Florida, this July 20th, 1939.

JOHN W. HOLLAND,  
United States District Judge.

977 District Court of the United States for the Southern District of Florida.

United States of America,  
Southern District of Florida.

I, EDWIN R. WILLIAMS, Clerk of the District Court of the United States for the Southern District of Florida, do hereby certify that the foregoing pages numbered 1 to 974, inclusive, contain and form a full, true and complete transcript of the record and proceedings in the case entitled Alma Chambers, as Executrix of the Estate of Henry Yeiser, Jr., as owner of the American Yacht "Friendship II" for limitation of liability, Appellant, versus Charlotte Cross Just and Anne Elise Gruner, Appellees, No. 147 Miami Admiralty, of the docket of this Court, as made up in accordance with Rule 49 of the Admiralty Rules.

Witness my hand, and the seal of said Court, at the City of Miami, Florida, this 27th day of July, A. D. 1939.

EDWIN R. WILLIAMS,  
Clerk.

By GEO. W. LITCHFORD,  
Deputy Clerk.

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Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

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[fol. 863] That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 31st, 1940

No. 9218

ALMA CHAMBERS, as Executrix of the Estate of Henry C. Yeiser, Jr., as Owner of the American Yacht "Friendship II",

versus

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER

On this day this cause was called, and, after argument by Raymond Farmer, Esq., for appellant, and M. L. Mershon, Esq., for appellee, was submitted to the Court.

[fol. 864] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 9218

ALMA CHAMBERS, as Executrix of the Estate of Henry C. Yeiser, Jr., as Owner of the American Yacht Friendship II, Appellant,

versus

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER, Appellees  
Appeal from the District Court of the United States for  
the Southern District of Florida

Before Foster, Sibley and Hutcheson, Circuit Judges

OPINION OF THE COURT and DISSENTING OPINION OF HUTCHESON, CIRCUIT JUDGE, THERETO—Filed June 21, 1940

SIBLEY, Circuit Jrdge:

This case involves claims by the appellees, Charlotte Cross Just and Anne Elise Gruner, for damages for personal injuries due to carbon monoxide gas poisoning occurring on board the yacht Friendship II, owned at the time by Henry C. Yeiser, Jr. The yacht was built in New Jersey, but it does not appear where she is enrolled. The suit began in the United States District Court for the Southern Dis-



[fol. 865] trict of Florida, Miami Division, as a petition for limitation of liability filed by appellant as duly qualified executrix of Yeiser's estate. The petition denied liability and in the alternative claimed a limitation to the value of the offending vessel. This appeal, taken under the authority of the Act of April 8, 1926, c. 102, 28 U. S. C. A. Sec. 227, is from an interlocutory decree rendered on the merits in favor of the claimants and denying limitation.

From Friday, February 28, until Monday, March 2, 1936, the appellees were guests on board the Friendship II on a fishing trip and cruise. They were at all times within the territorial limits of the State of Florida. The appellees had been assigned a double stateroom at the stern of the vessel directly above the bilge, through which ran the exhaust pipes from the yacht's engines. On Monday morning, when the yacht was nearing Miami on the return trip, the appellees were discovered unconscious in their beds. They were treated upon their return, but allegedly received injuries of a permanent as well as of a temporary nature. Five days after the return, from causes unrelated to the accident, Yeiser died. These claims were filed against his estate.

The appellant has questioned the sufficiency of the evidence to support the findings of the District Judge. The Friendship II is a cruising houseboat yacht powered by twin gasoline motors. At the time of the accident, there were several holes in both the port and the starboard exhaust pipes which passed directly through the bilge. The windows of the stateroom which the appellees were using were closed, but in the walls were a number of vents and openings so designed that air from the bilge would circulate through the stateroom. The District Judge found that carbon monoxide gas in the form of exhaust fumes which were escaping from the pipes collected in the bilge and, passing through the vents into the stateroom, overcame the appellees while they were asleep and were the proximate cause of the injuries complained of. These findings were based on the oral testimony of the witnesses taken in open court. The District Judge had the opportunity which we do not have of facing each witness and of judging at first hand the weight of what he had to say. Every finding of fact which the judge made is supported by evidence. Where there is a conflict of evidence we are not in position to say that the appellees' evidence is unworthy of belief.



*Colvin v. Kokusai Kisen Kabushiki Kaisha*, 5th Cir., 72 F. (2d) 44.

A second assignment of error is to the effect that Yeiser owed no duty to make the yacht safe for the appellees, they being mere gratuitous invitees on board the vessel. Yeiser was familiar with gasoline motors. He had been told at the time he purchased the *Friendship II* that the port exhaust pipe should be renewed. Twice before, to Yeiser's knowledge, persons aboard the yacht had been affected by carbon monoxide gas, the last time being in September, 1935, when Yeiser's two sons were overcome in the same stateroom. At that time, a more or less superficial investigation having been made, no defects were discovered. Assuming that the gas was blowing in over the stern, Yeiser simply repeated a previous order to keep the rear windows closed. Nevertheless, he had been put on notice of the defective condition of the pipes and of the tendency of the gas to enter the stateroom. He was cognizant of the ultimate cause and of the result, and, whether or not he properly connected the two, he must be held to have known of the dangerous condition existing aboard the vessel and of the possibility of injury to the appellees at the time he assigned the stateroom to them. Knowing of the condition, he is responsible for failure to remedy the defect or at least to warn the appellees of its existence. *Restatement of Torts*, Sec. 342.

Responsibility for the injury having been established, it [fol. 867] remains to be determined whether the appellant is entitled to a limitation of liability. Since a proper inspection of the vessel would have shown the defective condition of the pipes, and Yeiser was himself present and in charge, the injuries were not occasioned without the knowledge or privity of the shipowner. Because he failed to make such an inspection, he may not have limitation. *The Republic*, 61 Fed. 109; *Christopher v. Grueby*, 40 F. (2d) 8.

The question principally contested in the case concerns the effect of Yeiser's death upon the claimants' causes of action *in personam*. It is admitted that the action in rem survives and that the claimants may recover up to the value of the ship. *The Ticeline*, 208 Fed. 670. However, the common law rule is that a personal right of action abates upon the death of either party, and there are admiralty precedents to the same effect. *Crapo vs. Allen*, Fed. Cas. No. 3, 360; *In re Statler*, 31 Fed. (2d) 767. Upon the basis of

these precedents, the appellant has strenuously questioned the applicability of a decision of the Supreme Court of Florida holding that the death of the tortfeasor does not extinguish a right of action for the recovery of purely compensatory damages for personal injuries. *Waller vs. First Savings & Trust Co.*, 103 Fla. 1025. The decision was by a divided Court, and based upon the provisions of the local constitution and a local statute. The argument challenges the use of State laws and decisions as rules of decision in cases within the maritime jurisdiction of the federal courts and urges that the subject is properly one which requires uniformity.

It is no longer questionable that a tort occurring upon navigable waters of a State of the United States is within the maritime jurisdiction of the federal courts. *De Lovio vs. Boit*, Fed. Cas. No. 3, 776; *Waring vs. Clarke*, 5 How. 441; *The Propeller Genesee Chief vs. Fitzhugh*, 12 How. [fol. 863] 443. Nor may the power of Congress, by virtue of the paramount maritime jurisdiction of the United States, to prescribe substantive rules of law with respect to maritime torts be challenged. *Detroit Trust Co. vs. The Barlum*, 293 U. S. 21. Where the injured person dies as the result of an injury the common law afforded no action for the wrong either to the estate of the deceased or to his dependents. Lord Campbell's Act in England, and similar statutes in the States of the United States have changed this rule, and it was never the rule of the civil law. Admiralty courts have held that where the law of the country of the ship's flag allows recovery for a wrongful death on land a libel will lie for such a death at sea. *The Hamilton*, 207 U. S. 398, *La Burgogne*, 210 U. S. 94. The matter is now put under a uniform rule by federal statute. 46 U. S. C. A. Sects. 761-768.\* Congress has made no statute

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\* The federal statute, like most of the death statutes, does not provide for a survival of the injured person's right of action but gives a new right of action which arises out of the death, in favor of named beneficiaries, the damages to be measured by their pecuniary loss. The suit is then not for a personal injury, but for a property damage. The question of survival vel non of a personal right of action is not involved. *Re Meekin*, 164 N. Y. 145, 79 A.S.R. 635. Decisions about death claims sustained in admiralty are not at all in point.

touching the case where the tortfeasor dies before suit or judgment. Here also the common law held that there could be no recovery against the personal representative. The reason given by Blackstone, 3 Comm. \*302, is: "And it shall never be revived either by or against the executors or other representatives; for neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity any manner of wrong or injury." Chancellor Kent thus states it, 2 Comm. Holmes 12th Ed., \*416, "Causes of action arising *ex delicto*, for wrongs for *personal* injuries, die with the person and do not survive against his representatives. Executors and administrators are the representatives of the personal [fol. 869] *property* of the deceased, and not of his wrongs, except so far as the tortious act complained of was beneficial to his estate." *Crapo vs. Allen*, and *Re Statler*, *supra*, assert that in admiralty also this rule applies. We have found no case to the contrary.

A personal injury inflicted by negligence on shipboard and on navigable waters is undoubtedly a maritime tort. *Atlantic Transport Co. vs. Imbrovek*, 234 U. S. 63. In the present case the ship was in fault as well as the owner, and the person injured was aboard for purposes of navigation, if such elements are supposed to be of importance in the discussion in the *Imbrovek* case. "The law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer." *Ormsby vs. Chase*, 290 U. S. 387. The place of the wrong here to be considered is shipboard, navigable waters, rather than the territorial limits of Florida. Sailors, passengers and guests on vessels in Florida waters are under maritime law as regards the safety of the vessel and the care due by master or owner, rather than under the law of Florida. A proper uniformity requires that it be so. The duties of ship and owner to those on board do not change as the ship passes invisible State boundaries. In a common law State like Georgia, a cause of action for a tort does not survive the death of the tortfeasor before suit. *Frazier vs. Georgia R. R. Co.*, 101 Ga. 77; *Smith vs. Jones*, Admr., 138 Ga. 716; though the contrary is held in Florida. Had the injuries here in question occurred on a night trip from Brunswick, Ga., to Jacksonville, Fla., the survival of personal liability would, if State law controls, depend on whether the gas was inhaled in Georgia or Florida waters, and probably

could not be determined at all. We are of opinion that principles of admiralty law govern, uniform at least throughout the United States, and the principle touching [fol. 870] survival heretofore declared is that a personal liability for an injury to person due to negligence does not survive the death before libel of the tortfeasor. If the law is to be changed, it ought to be by Act of Congress.

Nothing can be made of the argument that appellees could have sought a common law remedy in a Florida court if this proceeding had not stopped them. Yeiser died a citizen of Ohio, and there his executor was appointed and resides. It is not apparent how a Florida court would obtain personal jurisdiction. But if it could, the suit would still have been for a maritime tort, and appellees would have no rights different from what they would be in a court of admiralty, the remedy alone being different. *Messel vs. Foundation Co.*, 274 U. S. 427; *Chilentes v. Luckenbach S. S. Co.*, 247 U. S. 372.

The interlocutory decree is affirmed as to the liability of the ship, but is reversed in so far as it holds that the personal liability of Yeiser survived his death. Damages may be assessed against the vessel and her proceeds only. The costs of this appeal will be equally divided between appellant and appellees.

HUTCHESON, Circuit Judge, dissenting:

My only difference with my brothers is upon whether Yeiser's death caused an abatement of the action in personam against him. Both by statute and by the common law of Florida,<sup>1</sup> personal injury actions arising in [fol. 871] that state do not abate. Congress has not chosen to enact any law relative to the survival of actions in personal injury cases arising on navigable waters of a state. The answer to the case is to be found in traditional principles of maritime law accepted from the English High Court of Admiralty by the federal courts under the constitutional

<sup>1</sup> See Secs. 4211, 7047, 7048, C. G. L., 1927; *Waller v. First Savings & Trust Co.*, (Fla., 1931) 138 So. 780; *Granat v. Biscayne Trust Co.*, (Fla., 1933) 147 So. 850; *Penn v. Pearce*, (Fla., 1935) 163 So. 288; *International Shoe Co. v. Hewitt*, (Fla., 1936) 167 So. 7; and *State v. Parks*, (Fla., 1937) 175 So. 786.



grant of power, or in the common law, and for this case, that is, the law of the state in whose waters the injury occurred for there is no general common law. I concede that the traditional common law rule was that a personal right or action abated upon the death of either party and that following that traditional common law rule, there are Admiralty precedents to the same effect. On the authority of *The Harrisburg*, 119 U. S. 199, I deny that there is any traditional maritime law to apply to this case, and point out that since Admiralty in this matter merely follows the common law, there is no basis here for the holding that in Admiralty the cause abates.

It is the crux of the appellant's argument that the common law principle "*actio personalis moritur cum persona*" has been adopted as a part of the general maritime law. The Supreme Court, in *The Harrisburg*, *supra*, cited by the appellant, denies this. The suit was for wrongful death, and the argument was made that the maritime law itself afforded such a right of action, but Mr. Chief Justice Waite, observing that "the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched," chose, in the absence of a state statute to the contrary, to follow the common law, because no country should adopt "a different rule on this subject for the sea from that which it maintains on the land." 119 U. S. 199, at 213. In *re Statler*, D. C. N. Y., 31 F. (2d) 767, involving death claims under the Seamen's Act of 1920, is to the same effect. There, the alleged tortfeasor died before the trial. It was held that the action abated because the [fol. 872] statute must be interpreted in the light of the traditional common law rule of survival which was the rule in that state.

The import of these decisions and of those that follow is that the common law and not an independently existing system of maritime law furnishes the applicable principles relative to survival of actions in admiralty. The fact is that the maritime law, as applied either in the federal courts or by the old High Court of Admiralty in England, has never been considered as a complete and all-inclusive body of substantive law distinct from and coextensive with the common law itself. The maritime law may be, and, as a matter of practice, is often supplemented by the common law. This "common law" to which we refer can only be the law of the



state; "there is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U. S. 64, at 78.

Accordingly, admiralty courts have uniformly given effect to the wrongful death statutes of the various states without regard to whether the action was originally brought in the state court at common law (*Steamboat Co. v. Chase*, 16 Wall. 522; *Sherlock v. Alling*, 93 U. S. 99) or in the federal court in admiralty (*The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 94; see *The Corsair*, 145 U. S. 335). Some of these early decisions have been superseded by the Death on the High Seas Act of March 30, 1920, c. 111, 46 U. S. C. A., Secs. 761-768, but the principle they represent has never been repudiated. The Act does not alter the prior law insofar as the Great Lakes and the territorial waters of the states are concerned. The law of the state where the injury occurs determines whether or not the claim for damages survives. *Ormsby v. Chase*, 290 U. S. 387; *Restatement of Conflict of Laws*, Sec. 390. That this law is declared by the highest court in a decision rather than by the legislature in a statute is not a matter of federal concern. *Erie* [fol. 873] *R. Co. v. Tompkins*, *supra*. Therefore, the decision of the Supreme Court of Florida in the Waller case should be determinative of the issue here in controversy, unless the case is within the scope of the doctrine of uniformity of admiralty law in its characteristic features.

With respect to those activities which are directly connected with commerce and navigation in their interstate and international aspects, it has been held, though in the opinion of the writer, with doubtful wisdom and logic, that the law must be uniform throughout the United States, and the laws of the various states are not competent to modify or vary it. *Southern Pac. Co. v. Jensen*, 244 U. S. 205; *Clyde S. S. Co. v. Walker*, 244 U. S. 255; *Peters v. Veasey*, 251 U. S. 121; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. The rationale of the cases holding invalid the application of state workmen's compensation laws to maritime employees is that a state law cannot affect a maritime contract or matters incidental thereto. But, illustrating the narrow and tenuous authority of these cases, is the well settled rule that though the contract is maritime if it is local in character and has no direct relationship to navigation, state compensation laws are applicable to determine rights and liabilities and to regulate the method of seeking relief, because they do not interfere with any characteristic feature of the maritime

law. *Grant Smith-Porter Co. v. Rhode*, 257 U. S. 469; *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 51; *Carlin Constr. Co. v. Heaney*, 299 U. S. 41.

A tort action for wrongful death has no relationship to navigation, no characteristic features of maritime laws are distorted thereby, and there is no necessity for uniformity. *Western Fuel Co. v. Garcia*, 257 U. S. 233. With regard to its effect upon any characteristic feature of maritime law, there is, there can be, no distinction between a death act and [fol. 874] a survival statute. To modify and supplement by a state statute or by the common law of a state in whose waters the injury occurs, the rule applied in admiralty courts when following the common law does not prejudice the uniform administration of maritime law, 257 U. S. 233, at 242, and since in matters of survival of actions admiralty follows the common law, there is no need for uniformity. The early case of *Crapo v. Allen*, Fed. Case, No. 3360, though correctly decided on its facts,<sup>2</sup> represents in its general statements, a view contrary to that herein expressed, that "the right of action by the general maritime law dies with the person injured" and that the right of survival of actions for torts, created by Massachusetts local law, should not be enforced. Subsequent cases have not sustained those general views. No valid distinction from the point of view of uniformity can be made between a survival action and an action of wrongful death of which the books are full. Here the injury occurred in the territorial waters of Florida and there can be no doubt that had a common law action been brought in Florida, it could have been maintained. 2 C. J. S., Sec. 62, page 124.

It is certainly, I think, unreasonable to say that though the action would have survived if brought at law, appellees may, by an injunction out of Admiralty, be prevented from asserting their right either at law or in Admiralty.

In *The Hamilton*, 146 Fed. 727, the court said of a death action: "We cannot doubt that had suits been brought for these deaths in the courts of Delaware, the plaintiff would have succeeded. By the action of the petitioners they are enjoined. Every consideration, based on equity and natural

<sup>2</sup> The injury sued for occurred not in the territorial waters of Massachusetts but on the high seas, and there was no proof as in *The Hamilton*, that Massachusetts was the state of the ship's flag.

[fol. 875] justice impels us to hold that it was not the purpose of the limited liability act to enable vessel owners to force claimants into the Admiralty, and thus avoid claims which are valid and enforceable at common law. The intent was to limit the liability, not to destroy it."

This decision and its reasoning was affirmed in the Supreme Court, 207 U. S. 398, which also adequately disposes of the concern of the majority over interference with uniformity. Said the court: "Enforcement of the death statute would not produce any lamentable lack of uniformity as courts everywhere must enforce the laws which govern the transaction, even if they are different from those governing the local transaction of the jurisdiction in which they sit." Finally, I see no breach of Admiralty uniformity here at all. All admit that the cause of action against the yacht is not affected by the death of its owner<sup>3</sup> and that there was a cause of action against Yeiser in his life time. There is no effort as there is in the death cases, to introduce into Admiralty a new and strange kind of cause of action. There is merely an effort to have Admiralty continue, notwithstanding the death of the tortfeasor, to enforce the cause of action which it, as well as the common law of Florida, gave the plaintiff and it, following the common law of Florida, may continue to give him.

It seems perfectly clear to me that Admiralty should not here follow the traditional common law rule of an action abating with the death of the wrongdoer in view of its almost universal disapproval in and disappearance from [fol. 876] the jurisprudence of American states and particularly in view of the fact, that there is now no general federal common law but only the common law of the state where the particular court is sitting. Particularly should we not follow this ancient and discredited rule, in the face of the considerations of humanity, of reason and of common

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<sup>3</sup> "A maritime lien arising from personal injury is a right of property on the vessel and therefore does not die with the person." *The Ticelime*, 221 Fed. 409, aff'g 208 Fed. 670; *The Lafayette*, 269 Fed. 917, 927. In *Crapo v. Allen*, 1 Sprague 184, Fed. Cas. No. 3360, the action held to have abated was in personam. In *The City of Belfast*, 135 Fed. 208, decision was based on a State statute as allowing survival of the action. Cf. *The Student*, 238 Fed. 936, aff'd 243 Fed. 807; *Benedict*, 5th Edition, Volume 1.

sense, together with the current of authority which now runs in favor of its abolition.

The District Judge was correct in refusing limitation of liability.. Having once acquired jurisdiction, the admiralty court was competent to give all claimants affirmative relief. The judgment should be affirmed.

I respectfully dissent from the reversal.

[fol. 877]

# JUDGMENT

Extract from the Minutes of June 21st, 1940

No. 9218

ALMA CHAMBERS, as Executrix of the Estate of Henry C. Yeiser, Jr., as owner of the American Yacht "Friendship II",

versus

CHARLOTTE CROSS JUST AND ANNE ELISE GRUNER

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the interlocutory decree of the said District Court in this cause be, and the same is hereby, affirmed as to the liability of the ship; and that this cause be, and it is hereby, reversed in so far as it holds that the personal liability of Yeiser survived his death. Damages may be assessed against the vessel and her proceeds only. The costs of this appeal will be equally divided between appellant and appellees;

It is further ordered, adjudged and decreed that the appellant, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., as owner of the American Yacht "Friendship II", be condemned to pay one half of the costs of this cause in this Court, and that the appellees, Charlotte Cross Just and Anne Elise Gruner, be condemned, in solido, to pay one half of the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Hutchenson, Circuit Judge, dissents."

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[fol. 898] ORDER DENYING REHEARING

Extract from the Minutes of July 31st, 1940

No. 9218

ALMA CHAMBERS, as Executrix of the Estate of Henry Yeiser, Jr., as owner of the American Yacht "Friendship II",

versus

CHARLOTTE CROSS JUST AND ANNE ELISE GRUNER

As neither of the judges who concurred in the judgment of the court in the above numbered and entitled cause is of the opinion that the petition for rehearing should be granted it is ordered that said petition be and the same is hereby Denied.

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[fol. 899] MOTION AND ORDER STAYING MANDATE—Filed August 8th, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 9218

ALMA CHAMBERS, as Executrix of the Estate of Henry C. Yeiser, Jr., as Owner of the American Yacht "Friendship II," Appellant,

vs.

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER, Appellees

Motion to Stay Issuance of Mandate Until October 1, 1940

Charlotte Cross Just and Anne Elise Gruner, appellees herein, respectfully show to this Court that they are preparing their petition for writ of certiorari which they intend to file in the Supreme Court of the United States, to have reviewed the decision and judgment of the United States Circuit Court of Appeals for the Fifth Circuit filed in the above entitled cause, and respectfully pray that an order be entered herein staying the issuance of the mandate herein

until October 1, 1940; and that the said order staying the said mandate be extended after October 1, 1940, until disposition of this cause by the United States Supreme Court upon the filing herein of a certificate or some equivalent showing from the Clerk of the United States Supreme Court, that within the said date application for a writ of certiorari has been duly made to the United States Supreme Court upon or prior to October 1, 1940.

Dated at Miami, Florida, this August 6, 1940.

(Signed) Walter R. Mayne, St. Louis, Missouri,

(Signed) M. L. Mershon, (Signed) W. O. Mehrtens,  
Miami, Florida, Proctors for Appellees.

Fordyce, White, Mayne, Williams & Hartman, St. Louis, Missouri, Evans, Mershon & Sawyer, Miami, Florida, Of Counsel.

Receipt of a true copy of the foregoing motion acknowledged, this August 6, 1940.

Kirlin, Campbell, Hickox; Keating & McGrann,  
Loftin, Calkins, Anderson & Scott, (Signed) by  
A. L. McCarthy, Proctors for Appellant.

11/be 1/7.

[fol. 900] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
FIFTH DISTRICT

No. 9218

ALMA CHAMBERS, as Executrix of the Estate of Henry C.  
Yeiser, Jr., as Owner of the American Yacht, "Friendship  
II", Appellant,

versus

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER, Appellees

On Consideration of the Application of the Appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of

this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 8th day of August, 1940.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 901]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 863 to 900 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9218, wherein Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., as owner of the American Yacht, "Friendship II," is appellant, and Charlotte Cross Just and Anne Elise Gruener are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, Vols. I. and II., numbered from 1 to 862, are identical with the printed record upon which said cause was heard and decided in the said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of August, A. D. 1940.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal.)

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[fol. 897] SUPREME COURT OF THE UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed October 21, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1702)





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CHARLES ELMORE CROPLEY

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

**No. 373**

CHARLOTTE CROSS JUST AND ANNE ELISE  
GRUNER,

vs.

*Petitioners,*

ALMA CHAMBERS, AS EXECUTRIX OF THE ESTATE OF HENRY  
C. YEISER, JR., AS OWNER OF THE AMERICAN YACHT  
"FRIENDSHIP II".

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.

✓ SAMUEL W. FORDYCE,

✓ WALTER R. MAYNE

*St. Louis, Missouri,*

M. L. MERSHON,

W. O. MEHRTENS,

*Miami, Florida,*

*Counsel for Petitioners.*

FORDYCE, WHITE, MAYNE, WILLIAMS & HARTMAN,

*St. Louis, Missouri;*

EVANS, MERSHON & SAWYER,

*Miami, Florida,*

*Of Counsel.*

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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1940

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No. 373

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CHARLOTTE CROSS JUST AND ANNE ELISE  
GRUNER,  
*Petitioners and Appellees Below,*

*vs.*

ALMA CHAMBERS, AS EXECUTRIX OF THE ESTATE OF HENRY  
C. YEISER, JR., AS OWNER OF THE AMERICAN YACHT  
"FRIENDSHIP II",  
*Respondent and Appellant Below.*

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.

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*To the Honorable Charles Evans Hughes, Chief Justice of  
the United States, and the Associate Justices of the  
Supreme Court of the United States:*

Charlotte Cross Just and Anne Elise Gruner, petitioners,  
respectfully show:

A.

**Summary Statement of the Matter Involved.**

This is a proceeding in admiralty brought by the Executrix of the Estate of Henry C. Yeiser, Jr., deceased, to

secure a limitation of or exoneration from liability for personal injuries negligently occasioned by the deceased before his death (R. 1-5).

Petitioners were guests of Yeiser aboard his yacht on a week-end cruise (R. 2, 28, 33). The yacht was at all times within the territorial limits of the State of Florida (R. 58, 59, 609-621). Petitioners had been assigned and were occupying a double stateroom at the stern directly above the bilge through which ran the vessel's exhaust pipes (R. 829, 826). Petitioners suffered personal injuries as a result of carbon monoxide escaping into their stateroom due to Yeiser's negligence (R. 830, 831). Their injuries were occasioned with the privity and knowledge of Yeiser, the yacht owner (R. 832, 833), who died five days after the trip from causes unrelated to the accident (R. 28, 33, 78). Petitioners filed claims against his estate (R. 3, 28, 34).

The Executrix of Yeiser's estate then filed her petition in admiralty for limitation of liability upon the statutory ground that the injuries were "without the privity and knowledge" of Yeiser (R. 2), and alternatively prayed for exoneration on the ground that the accident was unavoidable (R. 2). Upon issuance of monition (R. 6) petitioners denied the right to limitation or exoneration, asserted that their injuries were a direct and proximate result of the deceased yacht owner's negligence (R. 30, 31, 36) and prayed for personal judgments against his estate (R. 31, 37). The cause was tried solely upon the issues of liability and the right to limit (R. 44, 45). At the conclusion of the trial the Executrix contended (for the first time) that, as a matter of law, all causes of action *in personam* had abated as the result of Yeiser's death (R. 822), notwithstanding that under the law of Florida (statutory and common) such causes of action survive the death of the tort-feasor. The District Judge entered his written opinion (R. 819-824) and decree (R. 825-835), finding that the injuries were negli-

gently inflicted with the privity and knowledge of Yeiser (R. 819-824, 831, 832); that exoneration and the right to limit should be denied (R. 822, 833); that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, the statutes and common law of the State providing that such cause of action shall survive will be enforced in a Court of Admiralty (R. 822, 834)—and that therefore, as a matter of law, the causes of action *in personam* did not abate by reason of Yeiser's death.

From this decree for petitioners, an appeal was taken by the Executrix (R. 857). The Circuit Court of Appeals for the Fifth Circuit (Judges Sibley, Foster and Hutcheson) in a written opinion by Sibley, *C. J.* (R. 863-873) unanimously approved the findings of fact (R. 864) made by the District Judge (R. 825-835) and affirmed the decree in so far as it held that Yeiser was guilty of negligence and that the injuries were occasioned with his knowledge and privity (R. 865). A majority of the court (Sibley and Foster, *C. J.'s*), however, reversed the decree in so far as it held that the personal liability of the yacht owner survived his death as a result of the statutory and common law of Florida (R. 868). The majority held that a personal right of action abates upon the death of the wrongdoer under the common law "and there are admiralty precedents to the same effect" (R. 865); that therefore no effect can be given to the statutory and common law of Florida, providing that the death of a tort-feasor does not extinguish a right of action for personal injuries (R. 867-868), and that "uniformity requires it to be so" (R. 867). Hutcheson, *C. J.*, in a written opinion (R. 868-873), dissented from the latter holding on the ground that there is no "federal general law" or "any traditional maritime law" applicable to this case (R. 869) which prevents giving effect to the Florida rule, and that, since the action has no relationship to naviga-



tion "there is no necessity for uniformity" (R. 871). Judgment was entered affirming the decree as to the liability of the ship and reversing the decree in so far as it holds that personal liability of Yeiser survived his death (R. 873). Petition for rehearing by Charlotte Cross Just and Anne Elise Gruner upon the question of personal liability being abated was duly filed (R. 874), and denied July 31, 1940, without opinion (R. 894).

## B.

### Jurisdictional Statement.

1. The statutory provisions believed to sustain the jurisdiction are Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, and Section 129 of the Judicial Code, as amended April 3, 1926, 44 Stats. 233.

2. The statute, the validity of which is involved, is Acts of Florida, November 23, 1828, Section 30 (Revised General Statutes of Florida, Section 2571; Compiled General Laws of Florida, 1927, Section 4211); providing (as construed by the Supreme Court of Florida) that causes of action for personal injuries shall survive the death of either the injured person or the tort-feasor.

3. The date of the decree sought to be reviewed is June 21, 1940 (R. 863). Petition for rehearing was denied July 31, 1940 (R. 894).

4. The case is a proceeding in admiralty to limit liability (R. 1-5). The lower court decreed liability and denied limitation (R. 819-824, 825-835). The Circuit Court of Appeals for the Fifth Circuit affirmed the decree as to liability of the ship but reversed the decree in so far as it held that the liability of the shipowner *in personam* survived his death and allowed damages only against the vessel (R. 863-873) thereby completely determining the rights and liabilities of the parties.

5. Cases believed to sustain the jurisdiction are:

- Aktieselskabet Cuzo v. The Sucarseco*, 294 U. S. 394;  
*Cullen Fuel Co., Inc., v. W. E. Hedger, Inc.*, 290 U. S. 82;  
*The Linseed King*, 285 U. S. 502;  
*Liverpool, Etc., Nav. Co. v. Brooklyn Eastern District Terminal*, 251 U. S. 48;  
*Pendleton v. Benner Line*, 246 U. S. 353;  
*United States v. The Three Friends*, 166 U. S. 1;  
*Hamilton-Brown Shoe Co. v. Wolf Brothers Co.*, 240 U. S. 251;  
*Toledo Co. v. Computing Co.*, 261 U. S. 339.

C.

**The Questions Presented.**

1. Personal injuries are negligently caused, with the privity and knowledge of a shipowner, upon navigable waters within the territorial limits of a State, and the tort-feasor shipowner thereafter dies. The statutory and common law of such State provides that the cause of action for such injuries shall survive. Will the law of the State be applied, and will the cause of action be enforced *in personam*, by an admiralty court in a proceeding to limit liability instituted by the deceased tort-feasor's executrix?

2. A State statute provides that causes of action for personal injuries shall survive the death of the tort-feasor. In the absence of any Act of Congress, does the State statute work such material prejudice to the characteristic features of the general maritime law or so interfere with the proper harmony and uniformity of that law in its international and interstate relations, as to be ineffective and to preclude the enforcement of a claim *in personam* in an admiralty proceeding brought by a deceased shipowner's executrix to limit liability?

3. With regard to its effect upon any characteristic feature of maritime law, is there any distinction between a State death act and a State survival statute which permits enforcement of the death act but precludes enforcement of the survival statute in an admiralty proceeding to limit liability?

#### D.

#### Reasons Relied On for the Allowance of the Writ.

1. The majority decision of said Circuit Court of Appeals by holding the common law principle, "*actio personalis moritur cum persona*," has been adopted as a part of the general maritime law so as to exclude the operation of a State survival statute, is an erroneous decision of general admiralty law, and directly conflicts with the holding of this Court in *The Harrisburg*, 119 U. S. 199.

2. The majority decision of said Circuit Court of Appeals, that a State statute providing for survival of actions *in personam* against a deceased tort-feasor's estate will not be given effect in a limitation of liability proceeding because to do so will work material prejudice to the characteristic features of the general maritime law, involves an important question of Federal law which has not been, but should be, settled by this Court.

3. In holding that with regard to its effect upon any characteristic feature of maritime law there is a distinction between a death act and a survival statute and that "Decisions about death claims sustained in admiralty are not at all in point," the Circuit Court of Appeals refused to apply the applicable decisions of this Court to the undisputed facts in the case, thereby causing a direct conflict between the decisions of this Court and the Circuit Court of Appeals and rendering a decision upon an important question of general

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admiralty law which is untenable and in conflict with the applicable decisions of this Court.

4. The majority decision of said Circuit Court of Appeals is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court. The particular decisions referred to are:

*The Hamilton*, 207 U. S. 398;

*American Steamboat Co. v. Chace*, 16 U. S. (Wall) 522;

*Ex parte McNeil*, 13 U. S. (Wall) 236;

*Western Fuel Co. v. Garcia*, 257 U. S. 233;

*Sherlock v. Alling*, 93 U. S. 99.

5. Despite the many cases decided by this Court holding that an admiralty court will give effect to a statute of a State giving remedy for wrongful death (which cases the Circuit Court of Appeals refused to follow in this case), there is no decision of this Court as to whether, with regard to its effect on any characteristic feature of maritime law, there is a distinction between a State death act and a State survival statute which permits enforcement of the former but precludes enforcement of the latter in admiralty.

6. The majority decision of said Circuit Court of Appeals is in conflict with its own decision in *Quinette v. Bisso*, 136 Fed. 825, where that court recognized and enforced in admiralty a survival statute of Louisiana, and with the decision of the Circuit Court of Appeals for the Ninth Circuit, in the admiralty case of *Buttner v. Adams*, 236 Fed. 105.

7. The majority decision of said Circuit Court of Appeals, in effect, amends and modifies the United States statutes providing for limitation of liability by providing that such limitation may be obtained, despite privity and knowledge, if the shipowner dies.

8. The majority decision of said Circuit Court of Appeals entirely disregards the decision and holding by this Court in *Hartford Accident & Indemnity Company v. Southern Pacific Company*, 273 U. S. 207, that a limitation proceeding is one essentially *in rem* and *in personam*, which binds the owner's property as well as his person and furnishes a complete remedy for *all* claims whether strictly in admiralty or not.

9. To avoid unnecessary repetition, your petitioners refer to the dissenting opinion of Circuit Judge Hutcheson, reported at pages 868 to 873 of the Record, as reasons why a writ of certiorari should be granted as prayed, and respectfully request that this Court consider said dissenting opinion as a portion of petitioners' brief in support of this petition.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its Docket "No. 9218, Alma Chambers, as Executrix of the Estate of Henry C. Yeiser, Jr., as owner of the American Yacht 'Friendship II,' Appellant, v. Charlotte Cross Just and Anne Elise Gruner, Appellees," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals, in so far as the same (a) holds that no effect can be given to the Florida statutes (providing that the death of a tort-feasor does not extinguish the right of action) because to do so will work material prejudice to the characteristic features of the gen-



eral maritime law and impair its uniformity, and (b) grants limitation of liability, be reversed by the Court, and for such further relief as to this Honorable Court may seem proper.

Dated this August 23, 1940.

SAMUEL W. FORDYCE,  
WALTER R. MAYNE,  
*St. Louis, Missouri,*  
M. L. MERSHON,  
W. O. MEHRTENS,  
*Miami, Florida,*  
*Proctors for Petitioners.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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No. 373

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CHARLOTTE CROSS JUST AND ANNE ELISE  
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ALMA CHAMBERS, AS EXECUTRIX OF THE ESTATE OF  
HENRY C. YEISER, JR., AS OWNER OF THE AMERICAN YACHT  
"FRIENDSHIP II",  
*Respondent and Appellant Below.*

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI

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I.

**The Opinions of the Courts Below.**

The opinions (majority and dissenting) of the Circuit Court of Appeals for the Fifth Circuit are dated June 21, 1940. Not yet officially reported, they appear at pages 863 to 873 of the record.

The opinion of the District Court, though not officially reported, appears at pages 819 to 824 of the record, while

the decree of that court containing findings of fact and conclusions of law is found at pages 825 to 835 of the record.

## II.

### Jurisdiction.

A full statement of jurisdiction has been given under the heading "B" in the petition (pp. 4-5), which is here adopted and made a part of this brief.

## III.

### Statement of the Case.

A full statement of the case has been given under heading "A" in the petition (pp. 1-4) and, in the interest of brevity, will not be repeated at this point.

## IV.

### Specifications of Errors.

1. The said Circuit Court of Appeals erred in finding and holding that the common law with respect to abatement of actions *in personam* has been adopted as part of the general maritime law and cannot be modified or supplemented by the common law and statutes of a state providing for survival of such actions.

2. The said Circuit Court of Appeals erred in finding and holding that petitioners' respective causes of action against the yacht owner, Yeiser, *in personam* abated as a result of the death of Yeiser prior to the filing of the petition seeking to exonerate his estate from liability or to limit that liability.

3. The said Circuit Court of Appeals erred in finding and holding that, although personal injuries are negligently

caused with the privity and knowledge of a shipowner upon waters within the territorial limits of a State, and the tort-feasor shipowner thereafter dies, and the statutory and common law of the State provides that the cause of action for such injuries shall survive,—nevertheless, such cause of action abated upon the tort-feasor's death, and cannot be enforced *in personam* by an admiralty court in a proceeding instituted by the deceased tort-feasor shipowner's executrix seeking to limit liability.

4. The said Circuit Court of Appeals erred in finding and holding that with regard to its effect upon any characteristic feature of maritime law, there is a distinction between a death act and a survival statute and that "decisions about death claims sustained in admiralty are not at all in point."

5. The said Circuit Court of Appeals erred in not finding and holding that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, a State statute providing that the cause of action for such injuries shall survive will be enforced in a proceeding in admiralty to limit liability.

6. The said Circuit Court of Appeals erred in not finding and holding that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, the subject is maritime and local in character, and that the specified modification of, or supplement to, the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.



7. The said Circuit Court of Appeals erred in finding and holding that no effect could be given to the Florida statute and common law providing for survivorship of actions *in personam*; that petitioners' causes of action *in personam* had abated; that the decree of the District Court denying limitation of liability should be reversed; and that limitation of liability should be decreed.

## V.

### ARGUMENT.

#### Summary of the Argument.

POINT A. The decision of the Circuit Court of Appeals, that the common law rule "actio personalis moritur cum persona" has been adopted as a part of the general maritime law and cannot be modified or supplemented by a State survival statute, is contrary to and in conflict with prior applicable decisions of this Court.

POINT B. The decision of the said Circuit Court of Appeals, that a State statute and common law providing for survival of actions *in personam* against a deceased tortfeasor's estate will not be given effect in a limitation of liability proceeding because to do so will work material prejudice to the characteristic features of the general maritime law, involves an important question of Federal law which has not been, but should be, settled by this Court, and in arriving at said decision the said Circuit Court of Appeals refused to apply the applicable decisions of this Court.

## POINT A.

The decision of the Circuit Court of Appeals, that the common law rule "*actio personalis moritur cum persona*" has been adopted as a part of the general maritime law and cannot be modified or supplemented by a state survival statute, is contrary to and in conflict with prior applicable decisions of this Court.

Congress has not enacted any law relative to the survival of actions in personal injury cases arising on navigable waters of a State. The majority decision of the Circuit Court of Appeals, upon the authority of *Crapo v. Allen* Fed. Cases No. 3,360, and *In re Statler*, 31 Fed. (2d) 767, held that the common law rule that a personal right of action abates upon the death of either party is also the established general maritime law (R. 866, 867-869).

That holding is in direct conflict with the decision of this Court in *The Harrisburg*, 119 U. S. 199, a suit to recover for wrongful death, where the argument was made that the maritime law, in the absence of an Act of Congress or a State statute afforded such a right of action. Mr. Chief Justice Waite, after reviewing all of the earlier decisions, *in the absence of a State statute to the contrary*, followed the common law, saying (119 U. S. at 213):

"\* \* \* But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land; and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. It is not mentioned in the laws of Oleron, of Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx., nor in the Marine Ordinance of Louis XIV, 2 Pet. Adm. Dec. Appx.; \* \* \*. Since, however, it is now established that in the courts of the United States no action can be maintained for such a wrong in the absence of a statute

*giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule."* (Emphasis ours.)

In *The Corsair* (*Barton v. Brown*), 145 U. S. 335, this Court, by Mr. Justice Brown, said (145 U. S. at 344):

" \* \* \* Subsequently in the case of *The Harrisburg*, 119 U. S. 199 (30:358), it was held that in the absence of an Act of Congress or a state statute giving a right of action therefor, a suit in admiralty could not be maintained to recover damages for the death of a human being, caused by negligence. *This was a mere application to the court of admiralty of a principle which had been announced by this court as applicable to courts of common law in the Mobile L. Ins. Co. v. Brame*, 95 U. S. 754 (24:580)." (Emphasis ours.)

In *Western Fuel Co. v. Garcia*, 257 U. S. 233, this Court, by Mr. Justice McReynolds, in an action for wrongful death, approved the above holding, saying (257 U. S. at 240):

" \* \* \* At the common law no civil action lies for an injury resulting from death. *The maritime law as generally accepted by maritime nations leaves the matter untouched* and in practice each of them has applied the same rule for the sea which it maintains on land. *The Harrisburg*, 119 U. S. 204, 213, 7 Sup. Ct. 140, 30 L. Ed. 358; *The Alaska*, 130 U. S. 201, 209, 9 Sup. Ct. 461, 32 L. Ed. 923; *La Bourgogne*, 210 U. S. 95, 138, 139, 28 Sup. Ct. 664, 52 L. Ed. 973." (Emphasis ours.)

In the leading case of the *City of Norwalk*, (D. C. N. Y. 1893). 55 Fed. 98, in an outstanding opinion by Judge Brown, the validity of a state statute giving damages for death by negligence was upheld. Among other things, the Court said (text 107, 112) :

“Still further, it must be borne in mind that the maritime law is not in itself a complete and perfect system. In all maritime courts there is a considerable body of municipal law that underlies the maritime as the basis of its administration. Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary, fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, i. e. from the municipal law, which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects. These general rights and regulations of persons and property are subject to the control of the state and may be changed as the state sees fit, if they are not regulated by congress and do not trench upon its exclusive authority. \* \* \*

“It was upon the recognition of this principle alone, as I understand, that in the case of *The Harrisburg*, 119 U. S. 199, 213, 7 Sup. Ct. Rep. 140, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority; namely, *because there is no rule on this subject belonging specially to the maritime law as such. ‘It (the maritime law) leaves the matter untouched.’* Page 213, 119 U. S., and page 146, 7 Sup. Ct. Rep. And since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common law of this country such a cause of action does not survive,—the latter rule must, therefore, obtain in our courts of admiralty. In

other words, *it is the municipal law that on such a point determines the law applicable in a court of admiralty.* (Emphasis ours.)

“In the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, the libel was dismissed, not because of any lack of jurisdiction, but because of the absence of any act of congress creating the right; and because ‘the maritime law, as accepted and received by maritime nations generally, *leaves the matter untouched*,’ and the subsequent absence of any distinct rule in the maritime code; and therefore the courts of admiralty, it was held, must take their rule on that subject from the municipal law. *From that decision it necessarily follows, that within the sphere in which the municipal law is valid and operative, viz. within the navigable waters of the state, the state law, in the absence of any act of congress, as to the survival of any such right of action, or any distinctively maritime rule applicable to the case, must furnish the rule of law as to the right of recovery.* And this in effect is precisely what was said and applied in the case of *The Corsair*.” (Emphasis ours.)

It clearly appears from these decisions that, in the absence of an Act of Congress or a statute of a State, it is the common law and not an independent existing system of maritime law which furnishes the applicable principles controlling abatement or survival of actions in admiralty. Whitlock, “A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Facts,” (1908) 22 *Harvard Law Review* 403, 407, shows that “*actio personalis moritur cum persona*” was not part of the law of the Continental countries either afloat or ashore. *Hughes on Admiralty* (2nd Ed.), pages 224 to 227, is to the same effect. Mr. Justice Holmes has consistently pointed out the fact that the maritime law “is not a corpus juris.” It has never been considered as a complete and all-inclusive



ody of substantive law distinct from and co-extensive with the common law itself. The maritime law may be, and often is, supplemented by the common law. Thus, common law principles were applied in *Atlantic Transport Co. v. Ambrovec*, 234 U. S. 52, to sustain a libel *in personam* for personal injuries suffered while loading a ship:

It has often been said that there is no general common law of the United States. *Wheaton v. Peters*, 8 U. S. (Pet.) 591; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; *Erie R. Co. v. Tompkins*, 304 U. S. 64, where it is said (304 U. S. at 78):

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. *There is no federal general common law.* Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The only inference is that, while Congress remains silent, the maritime law is supplemented by the common law, and in the United States that means the common law of the State. *Sherlock v. Alling* 93 U. S. 99; *Taylor v. Carryl*, 20 U. S. (How.) 583. Even when admiralty has unquestioned jurisdiction, the common law may have concurrent authority and the State courts concurrent power. *Schoonmaker v. Gilmore*, 102 U. S. 118.

Accordingly, while the general principles of admiralty law follow the common law in refusing to recognize any right of action in the absence of a State statute, the admiralty courts have given effect to the various death stat-

utes of the different States without regard to whether the action was originally brought in the State court at common law (*American Steamboat Co. v. Chace*, 16 U. S. (Wall.) 522; *Sherlock v. Alling*, 93 U. S. 99) or in the federal admiralty court (*The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 94; see *The Corsair*, 145 U. S. 335).

In *The Hamilton*, *supra*, the Circuit Court of Appeals gave effect to a Delaware death statute, in a proceeding to limit liability, saying (146 Fed. 727):

"We cannot doubt that had suits been brought for these deaths in the courts of Delaware the plaintiffs would have succeeded. By the action of the petitioners they are enjoined from prosecuting their claims in the home forum and are compelled to present them here.

*"Every consideration based on equity and natural justice impels us to hold that it was not the purpose of the limited liability act to enable vessel owners to force claimants into the admiralty, and thus avoid claims which are valid and enforceable at common law. The intent was to limit the liability, not to destroy it."* (Emphasis ours.)

Thereafter, certiorari was granted. This Court, in an opinion by Mr. Justice Holmes, affirmed that decision and its reasoning, saying (207 U. S. 398, at 404):

" \* \* \* The doubt in this case arises as to the power of the states where Congress has remained silent.

"That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789 (1 Stat. at L. 77, Ch. 20, Sec. 9), 'saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it' (Rev. Stat., Sec. 563, Cl. 8, U. S. Comp. Stat., 1901, p. 457), leaves open the common-law jurisdiction of the state courts over torts committed at sea. This,

we believe, always had been admitted. *Martin v. Hunter*, 1 Wheat. 304, 337, 4 L. Ed. 97, 105; *The Hine v. Trevor* (*The Ad-Hine v. Trevor*), 4 Wall. 555, 571, 18 L. Ed. 451, 456; *Leon v. Calceran*, 11 Wall. 185, 20 L. Ed. 74; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. Ed. 159, 166, 11 Sup. Ct. Rep. 559. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature."

Although the Death on the High Seas Act of March 30, 1920, c. 111, 46 U. S. C. A. Secs. 761-768, has superseded some of these decisions, the principle they establish has never been repudiated. The Act does not alter the prior law in so far as the Great Lakes and the territorial waters of the States are concerned; but, by its own terms, the Act expressly excludes its operation within State waters and does not attempt to affect State statutes either "giving or regulating" (as by providing for survival of) actions for personal injuries resulting in death upon navigable waters within the boundaries of a State. *O'Brien v. Luckenbach S. S. Co.*, (C. C. A. 2, 1923) 293 Fed. 170. The law of the place where the injury occurs determines whether or not the claim for damages survives. *Ormsby v. Chace*, 290 U. S. 387. The mere fact that this law is declared by the highest court in a decision, rather than by the Legislature in a statute, is not a matter of Federal concern. *Erie R. Co. v. Tompkins*, 304 U. S. 64.

In Florida (by common law and by statute) a cause of action for personal injury survives the death of either the party injured or the tort-feasor. See Acts of Florida, Nov. 23, 1828, Section 30, being Sec. 4211, C. G. L., 1927; *Waller v. First Savings & Trust Co.* (1931), 103 Fla. 1025, 138 So. 780; *Granat v. Biscayne Trust Co.* (1933), 109 Fla. 485, 147 So.

850; *Penn v. Pearce* (1935), 121 Fla. 3, 163 So. 288; *International Shoe Co. v. Hewitt* (1926), 123 Fla. 587, 167 So. 7 and *State v. Parks* (1937), 129 Fla. 50, 175 So. 786.

In holding (upon the authority of the District Court case of *Crapo v. Allen*, Fed. Cases No. 3360, and *In Re Statler*, 31 F. (2d) 767) that the common law principle that cause of action for personal injuries die with the person is also the general maritime law which cannot be modified or supplemented by a State survival statute, the Circuit Court of Appeals refused to follow and conflicted with the applicable decisions of this Court. Neither of the cases cited by the Circuit Court were in point. In the early case of *Crapo v. Allen, supra*, the death for which suit was brought occurred upon the high seas and not in the territorial waters of Massachusetts. There was nothing to show (as in *The Hamilton, infra*) that Massachusetts was the State of the ship's flag. The general statements of District Judge Sprague in that case have not been sustained by subsequent cases and are directly contradicted by *The Harrisburg, supra*, *The Corsair, supra*, *Western Fuel Co. v. Garcia, supra*, and, as pointed out in *American Steamboat Co. v. Chace*, 16 U. S. (Wall.) 522, by Mr. Justice Clifford, "Judge Sprague also applied the same rule in the case of *Crapo v. Allen*, 1 Sprague 184, but in a later case he left the question open, with the remark that it cannot be regarded as settled law that an action cannot be maintained in such a case." *Cutting v. Seabury*, 1 Sprague 522."

The case of *In Re Statler, supra*, is not in point and does not support the principle for which it was cited. The cited case, being a suit founded on the Seaman's Act, 41 Stat. 1007 (1920, 46 U. S. C. A. 638), is merely authority to the effect that where a cause of action is given by a Federal statute, the principles of the common law (not maritime law) will determine whether such action survive when not

ing is said in the statute itself about survivorship. See *Schreiber v. Sharpless*, 110 U. S. 76, and cases cited in the Statler opinion.

It is *significant to note* that the majority opinion of the Circuit Court of Appeals, while refusing to apply the principles announced in *The Harrisburg*, *supra*, *The Hamilton*, *supra*, *Western Fuel Co. v. Garcia*, *supra*, and other cases decided by this Court upon the ground that "Decisions about death claims sustained in admiralty are not at all in point" (R. 866) nevertheless based its own contrary conclusion upon two cases directly involving "death claims sustained in admiralty."

It is respectfully submitted that the majority decision of the Circuit Court of Appeals that the common law rule "*actio personalis moritur cum persona*" has been adopted as a part of the general maritime law and therefore cannot be modified or supplemented by a State survival statute, is contrary to and in conflict with the above cited decisions of this Court.

#### POINT B.

The decision refusing to give effect to the Florida statute and common law providing for survivorship of actions for personal injuries because to do so would impair the uniformity of admiralty, involves an important question of Federal admiralty law which is in conflict with applicable decisions of this Court and which should be settled by this Court.

This Court has never decided whether admiralty courts will give effect to the statutory and common law of a State providing for survival of actions and permit enforcement of a claim *in personam* against a deceased tort-feasor's estate for personal injuries sustained upon the territorial waters of the State. Despite the importance of the question



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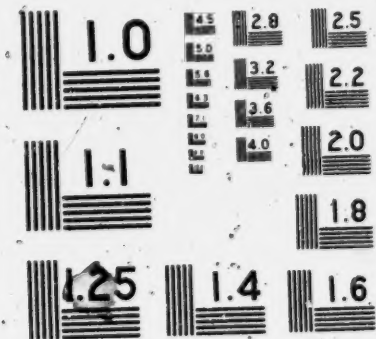
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# 17



involved, there is no decision of any court (other than the case at bar) directly upon the point. There are, of course, many decisions of this Court holding that effect is to be given in admiralty to a State statute (some of which are "death acts" and some "survival acts") providing a remedy for wrongful death. The majority of the Circuit Court of Appeals held that these cases were not in point and refused to apply the principles announced in them (R. 866). No valid distinction exists between a death act and a survival statute as to the effect upon maritime law. The death cases decided by this Court are not only applicable to this case, but the principles therein announced control this controversy. The majority decision of the Circuit Court of Appeals is untenable and in direct conflict with those decisions of this Court.

No State legislation is valid if it contravenes the essential purpose expressed by an Act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and unity of that law in its international and interstate relations. This Court has held that with respect to those activities directly connected with commerce and navigation in their interstate and international aspects, the law must be uniform throughout the United States, and the various States may not modify or vary it. *Southern Pac. Co. v. Jensen*, 244 U. S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. The able dissents of four Judges in each of the above cases, led by Mr. Justice Holmes, clearly show, however, that the maritime law has not preempted the entire field of personal injuries but, on the contrary, State statutes applying a remedy where there was none before (as in the instant case) will be recognized and enforced in admiralty. It is well settled that though the contract or tort is maritime if it is local in character and has no direct relationship to navigation, State laws are applicable to determine rights and

liabilities and to regulate the method of seeking relief because they do not work material prejudice to any characteristic feature of the maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Western Fuel Co. v. Garcia*, 257 U. S. 233; *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469; *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 51; *Carlin Constr. Co. v. Heaney*, 299 U. S. 41.

In the instant case the petitioners were not seamen (R. 2, 28, 33, 829). All of the parties were residing in Florida at the time, and the vessel was continuously at all times in State waters (R. 830). The captain and the engineer had their homes in Florida (R. 453), and Yeiser, the owner, lived aboard the vessel (R. 826). The vessel was docked at Miami, Florida, and Ft. Myers, Florida (R. 464). The trip was for pleasure and not for commerce. No fares were paid nor any money earned by operation of the yacht (R. 829). The vessel was not engaged in commerce, interstate or any other kind.

A tort action for wrongful death has no relationship to navigation, no characteristic features of maritime law are prejudiced thereby and there is no necessity for uniformity because the subject is local in character. Thus in *Western Fuel Co. v. Garcia*, 257 U. S. 233, this Court in affirming the right to sue in admiralty to recover damages by virtue of a State death statute, said (257 U. S. at 241, 242):

"In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, we have recently discussed the theory under which the general maritime law became a part of our national law and pointed out the inability of the states to change its gen-

eral features so as to defeat uniformity—but the power of a state to make some modifications or supplements was affirmed.

“As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. *The subject is maritime and local in character* and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern Pacific Co., v. Jensen, supra.*” (Emphasis ours.)

Such holding that “the subject” (being personal injuries resulting in death by wrongful act upon State waters) is *maritime and local in character*, is equally applicable where the “subject” is “personal injuries from wrongful act upon State waters *not* resulting in death.”

Such a conclusion was reached in *Buttner v. Adams, et al.*, (C. C. A. 9, 1916), 236 Fed. 105, where, in reversing a decree of the lower court which had dismissed a libel to recover for personal injuries, the Court of Appeals said (text 108):

“While the admiralty jurisdiction cannot be enlarged by State enactment (The *Lottawanna*, 21 Wall. 558, 22 L. Ed. 654), it is well settled that the maritime law may be changed by state enactment conferring rights of action arising out of marine torts resulting in death (The *Hamilton*, 207 U. S. 398, 28 S. Ct. 133, 52 L. Ed. 264; *LaBourgogne*, 210 U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973). *Such being the case as to torts resulting in death, no good reason is seen why the admiralty court may not have jurisdiction of a cause to recover damages for per-*



sonal injuries resulting from a marine tort against those whom the State law declares shall be primarily liable to respond in damages therefor. . . . We hold that a liability so created by state law and arising out of a marine tort is subject to the jurisdiction of a court of admiralty. It is believed that this view of the question does not contravene any decision of a federal court, or result in prejudice to the uniform administration of maritime law." (Emphasis ours.)

Mr. Justice Holmes, in *The Hamilton*, 207 U. S. 398 (*supra*, p. 20), has permanently and adequately disposed of any concern over interference with uniformity, saying (207 U. S. at 405):

"We pass to the other branch of the first question—whether the state law, being valid, will be applied in the admiralty. Being valid, it created an *obligatio*—a personal liability of the owner of the *Hamilton* to the claimants. *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 126, 48 L. Ed. 900, 902, 24 Sup. Ct. Rep. 581. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624, 626. It might not give a proceeding *in rem*, since the statute does not purport to create a lien. It might give a proceeding *in personam*. *The Corsair* (*Barton v. Brown*, 145 U. S. 335, 347, 36 L. Ed. 727, 731, 12 Sup. Ct. Rep. 949. *If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity. Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit.*" (Emphasis ours.)

No distinction in principle and reasoning from the point of view of uniformity, can be made between a survival statute and a wrongful death statute of which Mr. Justice



Holmes was speaking. Nevertheless, the majority opinion refused to recognize or follow the reasoning of Mr. Justice Holmes or the later decision of this Court in *Western Fuel C. v. Garcia*, *supra*, p. 16, *infra*, p. 25.

The opinion of the trial judge in the present case (R. 823) illustrates and follows the reasoning of the authorities here cited. Judge Holland said:

"As to a conflict with the uniformity required by the United States Constitution in regard to admiralty matters, I do not think the point is well taken because such uniformity is no more stricken down by a survivorship statute in regard to personal injury damages than by recognition of the right of action for death. In other words, if there is a statute in Florida, which there is, giving rise to a new action for death, and should there be no such statute in another state, for instance, South Carolina, certainly there would be a lack of uniformity there, yet that lack of uniformity is not held to be in conflict with the constitution. Likewise the survivorship of a personal injury damage is recognized by a Florida statute, and suppose the same is not recognized by a South Carolina statute. The same lack of uniformity exists, but in my opinion this lack of uniformity is not in conflict with the constitutional provisions of uniformity required or admiralty."

Another trial judge in an earlier case stated and applied the rule in admiralty, as announced by Mr. Justice Holmes. See *Amoth v. United States, et al.* (D. C. Ore., 1925), 3 F. (2d) 848.

"As to the effect upon any characteristic feature of the maritime law there is no distinction between a death act and a survival statute. At common law and in the maritime law which in the absence of a statute followed the common (municipal) law, there was no cause of action if, and after, either the injured person or the tort-feasor died. The cause of action abated upon the death of either party, and there was neither survival nor revival. It cannot be

said that death acts did not invade the law in the field of personal injuries, since there could be no wrongful death without personal injury. Death acts and survival acts both have a direct relationship to personal injuries and both provide a remedy for personal injury done to another. Neither can it be contended that death acts "do not modify" the existing maritime law which, in the absence of such statute, followed the common law. Before the passage of State "death" and "survival" acts there was no cause of action for wrongful death to be enforced. Likewise, there was no existing cause of action for personal injuries, if and after the tort-feasor died. State death acts changed, modified and supplemented the common law rule, followed in admiralty, by *giving a cause of action* for wrongful death with right to recover damages for such death and, in certain instances, the right to recover damages which the injured person might have recovered if he had lived) where none had existed before. The effect of State statutes providing for survival of causes of action for personal injuries (not resulting in wrongful death) must necessarily be to likewise supplement the common law rule followed in admiralty in the absence of such statute by giving a substantive right, enforceable by common-law remedy, where such right had not theretofore existed.

As shown by the cases herein cited, it is competent for the States to pass such statutes providing a remedy for personal injuries resulting in wrongful death, and they will be recognized and enforced in admiralty courts, without regard to whether they are death acts creating a new cause of action or survival acts continuing the cause of action.

The enforcement in admiralty courts of State statutes providing for the *survival of actions* is no new matter. In the case of *In re Long Island, etc.; Transportation Co.*, (D. C., 1881) 5 Fed. 599, the court, while limiting liability for wrongful death, said (text 608):

"It has been seriously doubted whether the rule of the common law, that a cause of action for an injury to the person dies with the person, is also the rule of the maritime law. There is some authority for the proposition that it is not, and that in admiralty a suit for damage in such a case survives. *The Sea Gull*, 1 L. T. R. 15; *Cutting v. Seabury*, 1 Sprague 522; *The Guldaxe*, 19 L. T. R. 748; *The Epsilon*, 6 Ben. 381. But however it may be in respect to the original jurisdiction of admiralty courts, I see no valid reason why the right of a person to whom, under the municipal law governing the place of the transaction and the parties to it, the title to the chose in action survives or a new right to sue is given for damages resulting from a tort, that admiralty courts, in the exercise of their jurisdiction in personam over marine torts, should not recognize and enforce the right so given. It has been held by the Supreme Court that such legislation by a state as applied to marine torts does not, in the absence of a commercial regulation by Congress covering the same field, intrench upon the exclusive powers given to the general government. *Steamboat Co. v. Chase*, 16 Wall. 522." (Emphasis ours.)

The Supreme Court of the United States, as well as the Circuit Court of Appeals for the Fifth Circuit, has recognized and enforced State survival acts.

Thus, in *American Steamboat Co. v. Chace*, (1873) 16 Wall. (U. S.) 522, the Rhode Island statute providing for survival of actions was held valid, this Court saying:

"Attempt is made to deny the right to such a remedy in this case, upon the ground that the operation of the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act; and the argument is that the cause of action alleged was not known to the common law at that period, which cannot be admitted, as actions to recover damages for personal injuries prosecuted in the name of the injured party were well known even in the early history of the common law. Such

actions, it must be admitted, did not ordinarily survive, but nearly all the states have passed laws to prevent such a failure of justice, and the validity of such laws has never been much questioned. *R. R. Co. v. Barron*, 5 Wall. 90 (72 U. S. XVII, 591).'' (Emphasis ours.)

*The Corsair*, (1892) 145 U. S. 335, illustrates that a survival statute is valid and enforceable in an admiralty court. There the claim was based solely on the Louisiana Code providing for the survival of actions for injuries resulting in death. The libel was *in rem* and while the court affirmed a dismissal of the libel because the Louisiana statute gave only a remedy *in personam* and not a remedy *in rem*, nevertheless, in discussing the applicable law, this Court said (145 U. S. at 347):

"In much the larger class of cases, the lien is given by the general admiralty law, but in other instances, such for example as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the district court may administer the law by proceedings *in personam*, as was done with a claim for half pilotage dues under the law of New York, in the case of *Ex parte McNiel*, 80 U. S. 13 Wall. 237 (20:624), but unless a lien be given by the local law, there is no lien to enforce by proceedings *in rem* in the court of admiralty." (Emphasis ours.)

The Massachusetts survival statute came before the court in *The Albeft Dunois*, (1900) 177 U. S. 24, a proceeding for limitation of liability. The admiralty court upheld and enforced a claim for a wrongful death, based upon that statute.

The Louisiana survival statute (which was considered in *The Corsair*, *supra*), giving to a survivor the right of action



for the damages which the deceased might have recovered had he survived the injury, was later upheld and enforced *in personam* by the admiralty courts.

In *Quinette v. Bisso et al.* (1905), 136 Fed. 825 (certiorari denied, 199 U. S. 606), the Circuit Court of Appeals for the Fifth Circuit recognized and enforced that survival statute of the State of Louisiana. The District Court had dismissed, on the ground of contributory negligence, a libel *in personam* to recover damages, brought under the Louisiana statute, resulting from the drowning of libelant's daughter. In reversing the lower court upon its finding of contributory negligence and directing entry of judgment for the libelant, the Circuit Court of Appeals recognized the State statute as giving the right of action, making contributory negligence a defense, if proved, and fixing the measure of damages to include those which the deceased might have recovered, saying (136 Fed., text 838):

"Without this statute the libelant could not maintain her libel. *The statute must be applied in admiralty just as if the suit had been brought in the state court, and any defenses which are open to the defendant under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel.*" (Emphasis ours.)

It is noteworthy that in the *Quinette* case, the admiralty court not only adopted and enforced the State statute, but held that it was controlled by the decisions of the State courts in construing the statute; and, that the admiralty court adjudged in one lump sum the aggregate damages to be recovered, which included under the express terms of the statute "the damages which the deceased could have recovered had she survived the injury."

From the decisions of this Court, it is clear that no violation of uniformity of maritime law is involved in giving effect to the Florida common law and statute under which petitioners' causes of action for personal injuries survived the death of the tort-feasor, Yeiser. The cause of action



*in rem* against the yacht was not affected by the death of its owner (*The Ticelene*, 208 Fed. 670). There also existed a cause of action against the owner in his lifetime. The Florida common law and statute make no attempt (as in death cases) to introduce into admiralty a new and strange kind of cause of action. On the contrary they merely preserve and confirm to injured persons, notwithstanding the death of the tort-feasor, the identical cause of action which maritime law, as well as the common law of Florida, gave to such persons, so that courts of admiralty following the Florida common law and statute, may continue to enforce such causes of action.

Precisely the same reasoning and argument used by the deceased tort-feasor's executrix, and adopted by the majority of the Circuit Court of Appeals in refusing to give effect to the Florida law, was advanced against the enforcement of State death acts, in *Sherlock v. Alling*, 93 U. S. 99. There, this Court, as early as 1876, held such reasoning and argument to be untenable and entirely devoid of merit.

The petitioners were already asserting their common-law remedy for the enforcement of their causes of action against the estate. They never invoked the admiralty jurisdiction nor asserted a maritime lien against the yacht but were forced into the admiralty court by the petition of the executrix for limitation of liability (which was strictly a defensive maneuver) and they were not only forbidden to go elsewhere but were commanded to file their claims in season or else get nothing. The limitation proceeding, however, was one essentially *in rem* and *in personam*, binding the owner's property as well as his person and furnishing a complete remedy for all claims whether strictly in admiralty or not. *Hartford Accident & Indemnity Co. v. Southern Pac. Co.*, 273 U. S. 207. Having once acquired jurisdiction, both *in rem* and *in personam*, the admiralty court was competent to give petitioners a complete remedy not only against the yacht but also against the deceased tort-feasor's estate.

The Circuit Court of Appeals, in refusing to give effect to the Florida law, has decided an important question of Federal Admiralty law which has not been, but should be, decided by this Court; that in arriving at its decision a majority of the said Circuit Court of Appeals has refused to recognize the above cited applicable decisions of this Court, and by so doing has reached a decision which directly conflicts with those decisions of this Court.

### Conclusion.

It is respectfully submitted, therefore, that this case is one calling for the exercise by this Court of its supervisory powers, in order that proper effect be given to the applicable decisions of this Court and that the important question of admiralty law here involved be permanently settled; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Fifth Circuit and finally reverse such decision in so far as it holds that no effect can be given in admiralty to the statutory and common law of Florida providing for survival of actions for personal injuries.

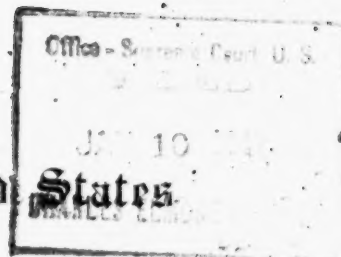
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**Supreme Court of the United States**



OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST AND ANNE ELISE GRUNER,  
PETITIONERS AND APPELLEES BELOW,

VS.

ALMA CHAMBERS, AS EXECUTRIX OF THE ESTATE  
OF HENRY C. YEISER, JR., AS OWNER OF THE  
AMERICAN YACHT "FRIENDSHIP II," RESPONDENT  
AND APPELLANT BELOW.

SUPPLEMENTAL BRIEF OF PETITIONERS ON  
CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR  
THE FIFTH CIRCUIT.

SAMUEL W. FORDYCE,  
WALTER R. MAYNE,  
St. Louis, Missouri,  
M. L. MERSHON,  
W. O. MEHRTENS,  
Miami, Florida,

*Proctors for Petitioners.*



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# Supreme Court of the United States

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OCTOBER TERM, 1940.

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No. 373.

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CHARLOTTE CROSS JUST AND ANNE ELISE GRUNER,  
PETITIONERS AND APPELLEES BELOW,

VS.

ALMA CHAMBERS, AS EXECUTRIX OF THE ESTATE  
OF HENRY C. YEISER, JR., AS OWNER OF THE  
AMERICAN YACHT "FRIENDSHIP II," RESPONDENT  
AND APPELLANT BELOW.

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SUPPLEMENTAL BRIEF OF PETITIONERS ON  
CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR  
THE FIFTH CIRCUIT.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinions (majority and dissenting) of the Circuit Court of Appeals for the Fifth Circuit are reported in *The Friendship II, Chambers v. Just et al.*, (June 21, 1940) 113 F. 2d 105. They also appear at pages 863 to 873 of the record.

The opinion of the District Court, though not officially reported, appears at pages 819 to 824 of the record, while the decree of that court containing findings of fact and conclusions of law is found at pages 825 to 835 of the record.

## II.

### JURISDICTION.

A full statement of jurisdiction has been given under the heading "B" in the petition (pp. 4-5) which is here adopted and made a part of this brief.

## III.

### STATEMENT OF THE CASE.

This is a proceeding in admiralty brought by the executrix of the Estate of Henry C. Yeiser, Jr., deceased, to secure a limitation of or exoneration from liability for personal injuries due to carbon monoxide gas poisoning occurring on board the houseboat yacht "Friendship II," owned at the time by Yeiser (R. 1-5, 863). The case is before this Court on certiorari to review that part of a judgment of the Circuit Court of Appeals for the Fifth Circuit which reversed the decree of the District Court in so far as the District Court held that the liability of Yeiser *in personam* survived his death.

Yeiser was an engineer (R. 98), a balloon pilot, a licensed airplane pilot, had made a study of boats, had owned several, had studied navigation, was studying to get a Master's license and had a knowledge of gasoline motors (R. 102). Prior to his purchase of the houseboat, holes had been discovered in the exhaust pipe (R. 773). He was told by the Captain then aboard the vessel that the port exhaust pipe should be renewed (R. 730, 749, 759, 865). After buying the boat, Yeiser experienced trouble because of exhaust gas (R. 435, 456, 532, 576, 578). While aware of the danger from the gas (R. 576, 579), he assumed that it was blowing in over the

stern. Twice before the trip on which petitioners were injured, to Yeiser's knowledge (R. 865, 457, 576), persons aboard the vessel had been affected by carbon monoxide gas. On the last occasion, his two sons were overcome while in the same stateroom he later assigned to the petitioners (R. 434, 455, 456, 531, 532, 573, 865). Yeiser was aboard at the time (R. 457) and knew of that occurrence (R. 576). He was fully aware of the danger from carbon monoxide gas and of the dangerous condition existing in that stateroom due to the tendency of the gas to enter therein. He also knew of the likelihood of such gas continuing to enter that stateroom and that it constituted a dangerous condition (R. 435, 461, 462, 578, 579, 865). He lived aboard (R. 61, 455), occupying a stateroom on the upper deck (R. 60), and the boat and crew were at all times under his immediate control and supervision when he was aboard the vessel (R. 576).

The vessel owned by Yeiser was a cruising houseboat yacht powered by twin gasoline motors (R. 1, 28, 33). The petitioners, two young ladies, were guests on board the houseboat for a week end cruise (R. 2, 28, 33). They were at all times within the territorial limits of the State of Florida (R. 58, 59, 609-621). The petitioners had been assigned to and were occupying a double stateroom at the stern of the vessel, directly above the bilge, through which ran the exhaust pipes from the vessel's engines (R. 830, 831, 864). They were discovered in an unconscious condition in their beds and suffered personal injuries as a result of carbon monoxide gas escaping into their stateroom (R. 64, 65, 91, 521, 830, 831, 864).

Five days after the petitioners were injured, Yeiser died from causes unconnected with the accident (R. 28, 33, 78). The petitioners thereafter filed claims against his estate for damages as a result of the injuries received by them (R. 3, 28, 34). The executrix of Yeiser's estate then filed her petition in admiralty for limitation of liability upon the statutory ground that the injuries were

occasioned "without the privity and knowledge" of Yeiser (R. 2) and alternatively prayed for exoneration on the ground that the accident was unavoidable (R. 2). The petitioners answered, denying the right to limitation or exoneration, asserting that their injuries were a direct and proximate result of Yeiser's negligence (R. 30, 31, 36) and praying for personal judgments against his estate (R. 31, 37).

The cause came on for trial, solely upon the issues of liability and the right to limit liability (R. 44, 45).

At the conclusion of the trial, the executrix, among other things, contended, *for the first time*, that if Yeiser did injure the petitioners, his personal liability ended with his death, and that the only liability which could exist is the liability of the vessel *in rem*, notwithstanding that under the law of Florida (statutory and common), such causes of action survive the death of the tort-feasor (R. 822).

The District Judge entered his written opinion (R. 819-824) and later his decree (R. 825-835) embodying findings of fact and conclusions of law, finding that as a direct and proximate result of Yeiser's negligence, the petitioners were injured by breathing carbon monoxide gas which had collected in the stateroom assigned to them by Yeiser; that the injuries were occasioned with the privity and knowledge of Yeiser (R. 819-824, 831, 832); that exoneration of liability and the right to limit liability should be denied (R. 822, 833); that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, the statute and common law of Florida providing that the cause of action shall survive will be enforced in a court of admiralty (R. 822, 834); that the subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper har-

mony of that law in its international or interstate relations and that, therefore, as a matter of law, the causes of action *in personam* did not abate by reason of Yeiser's death.

From this decree for petitioners, an appeal was taken by the executrix to the Circuit Court of Appeals for the Fifth Circuit (R. 857). In a written opinion, reported in 113 F. 2d, page 105, that Court unanimously approved the findings of fact (R. 864) made by the District Judge (R. 825, 835) and affirmed the decree in so far as it held that Yeiser was guilty of negligence and that the injuries were occasioned with his privity and knowledge (R. 865). A majority of the Court, however, consisting of Judges Sibley and Foster, reversed the decree of the District Court in so far as it held that the personal liability of Yeiser survived his death as a result of the statutory and common law of Florida (R. 868). The majority held that a personal right of action abates upon the death of the wrongdoer under the common law "and that there are admiralty precedents to the same effect" (R. 865); that, therefore, no effect can be given to the statutory and common law of Florida providing that the death of a tort-feasor does not extinguish a right of action for personal injuries (R. 867, 868) and that "uniformity requires it to be so" (R. 867). Circuit Judge Hutcheson, in a written opinion (R. 868-873), dissented from the latter holding on the ground that there is no "Federal general law" or "any traditional maritime law" applicable to this case (R. 869) which prevents giving effect to the Florida rule and that since the action has no relationship to navigation "there is no necessity for uniformity" (R. 871).

#### IV.

##### SPECIFICATIONS OF ERROR.

1. The said Circuit Court of Appeals erred in finding and holding that the common law with respect to abate-



ment of actions *in personam* has been adopted as part of the general maritime law and cannot be modified or supplemented by the common law and statutes of a state providing for survival of such actions.

2. The said Circuit Court of Appeals erred in finding and holding that petitioners' respective causes of action against the yacht owner, Yeiser, *in personam* abated as a result of the death of Yeiser prior to the filing of the petition seeking to exonerate his estate from liability or to limit that liability.

3. The said Circuit Court of Appeals erred in finding and holding that, although personal injuries are negligently caused with the privity and knowledge of a shipowner upon waters within the territorial limits of a State, and the tort-feasor shipowner thereafter dies, and the statutory and common law of the State provide that the cause of action for such injuries shall survive—nevertheless, such cause of action abated upon the tort-feasor's death, and cannot be enforced *in personam* by an admiralty court in a proceeding instituted by the deceased tort-feasor shipowner's executrix seeking to limit liability.

4. The said Circuit Court of Appeals erred in finding and holding that with regard to its effect upon any characteristic feature of maritime law, there is a distinction between a death act and a survival statute and that "decisions about death claims sustained in admiralty are not at all in point."

5. The said Circuit Court of Appeals erred in not finding and holding that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, a State statute providing that the cause of action for such injuries shall survive will be enforced in a proceeding in admiralty to limit liability.

6. The said Circuit Court of Appeals erred in not finding and holding that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, the subject is maritime and local in character, and that the specified modification of, or supplement to, the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

7. The said Circuit Court of Appeals erred in finding and holding that no effect could be given to the Florida statute and common law providing for survivorship of actions *in personam*; that petitioners' causes of action *in personam* had abated; that the decree of the District Court denying limitation of liability should be reversed; and that limitation of liability should be decreed.

## V.

**ARGUMENT.****SUMMARY OF THE ARGUMENT.**

**POINT A.** The decision of the Circuit Court of Appeals, that the common law rule "*actio personalis moritur cum persona*" has been adopted as a part of the general maritime law and cannot be modified or supplemented by a State survival statute, is contrary to and in conflict with prior applicable decisions of this Court.

**POINT B.** The majority decision refusing to give effect to the Florida statute and common law providing for survivorship of actions for personal injuries because to do so would impair the uniformity of admiralty is in conflict with applicable decisions of this Court and is erroneous.

**POINT A.**

**The Decision of the Circuit Court of Appeals, That the Common-law Rule "Actio Personalis Moritur Cum Persona" Has Been Adopted As a Part of the General Maritime Law and Cannot Be Modified or Supplemented by a State Survival Statute, Is Contrary to and in Conflict with Prior Applicable Decisions of This Court.**

Congress has not enacted any law as to the survival of actions in personal injury cases arising on navigable waters of a State. The majority decision of the Circuit Court of Appeals, upon the authority of *Crapo v. Allen*, Fed. Cases No. 3360, and *In re Statler*, 31 F. 2d 767, reversed the trial court and held that the common law rule that a personal right of action abates upon the death of either party is also the established general maritime law (R. 866, 867-869), thereby excluding the enforcement of

the statutory and common law of Florida providing for the survival of such actions. It is our contention that the majority decision is erroneous and in conflict with prior applicable decisions of this Court.

The common-law rule that a cause of action for personal injuries is extinguished by the death of either the injured person or the tort-feasor did not emanate from the ancient maritime codes and has never been peculiar to the maritime law as administered by nations generally. On the contrary, this doctrine of substantive law had its origin in England in the technical rule expressed in the maxim that a personal action dies with the person: "*actio personalis moritur cum persona*." As such it was recognized and applied by the English maritime courts. The leading Continental nations had no system of common law courts. In other European countries the contrary legal doctrine is so well established as to be there applied in cases arising on land and sea alike. See Hughes on Admiralty (2nd Ed.), page 226.

It was long a question in this country whether the harsh common-law rule would be recognized or applied by our admiralty courts. Some of the District Judges, when the question came before them, in early cases, decided that the common-law doctrine was not consonant with natural justice and did not govern the admiralty courts (*Sea Gull*, Fed. Cases No. 12578; *Highland Light*, Fed. Cases No. 6477). There they sustained suits for wrongful death when brought by the widow and child.

All doubts as to the rule to be applied by our admiralty courts, in the absence of statute, were finally set at rest by the decision of this Court in *The Harrisburg*, (1886) 119 U. S. 199. In that case it appeared that a collision had occurred between the schooner Tilton and the steamer Harrisburg, a Pennsylvania vessel, in Massachusetts waters. The mate of the Tilton was killed and his widow and child libeled the steamer. Both States had statutes giving a right of action but these were held inap-

plicable, as the libel had not been brought within the time required by those statutes. The question whether a suit in admiralty could be maintained to recover damages for wrongful death, in the absence of an Act of Congress or State statute, was squarely presented.

Mr. Chief Justice Waite, after reviewing all of the earlier decisions, *in the absence of a State statute to the contrary*, followed the common law, saying (119 U. S., at 213):

“\* \* \* But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land; and *the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched.* It is not mentioned in the laws of Oleron, of Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx., nor in the Marine Ordinance of Louis XIV, 2 Pet. Adm. Dec. Appx.; \* \* \*. Since, however, it is now established that in the Courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. *The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule*” (Emphasis ours). •

The next time this Court had occasion to pass upon the matter was in *The Corsair*, (1892) 145 U. S. 335. In that case a libel *in rem* had been filed by the parents of a passenger killed by negligence of the steamer in Louisiana waters. The claim was based upon the Louisiana Code providing for the survival of such actions. The question whether the admiralty courts will entertain a



libel *in rem* for loss of life where by local law the right of action survives but no lien is created was squarely presented. This Court, by Mr. Justice Brown, in holding that since the statute gave no remedy *in rem* the libel should be dismissed for lack of jurisdiction, reviewed the case of *The Harrisburg*, and said (145 U. S., at 344):

"\* \* \* Subsequently in the case of *The Harrisburg*, 119 U. S. 199 (30:358), it was held that in the absence of an Act of Congress or a state statute giving a right of action therefor, a suit in admiralty could not be maintained to recover damages for the death of a human being, caused by negligence. *This was a mere application to the court of admiralty of a principle which had been announced by this court as applicable to courts of common law in the Mobile L. Ins. Co. v. Brame*, 95 U. S. 754 (24:580)" (Emphasis ours).

The opinion indicates that an action *in personam* could have been sustained.

After *The Harrisburg* a conflict arose as to whether a single State could by statute change the common-law rule and create a liability enforceable in admiralty. In that chaos of contrary rulings the Honorable Addison Brown, a most experienced judge, then presiding in the District Court of New York, reviewed the precedents and, in an opinion of notable perspicacity and erudition, enforced the New York death statute giving damages for death by negligence, under a libel *in personam*, where the death occurred on the navigable waters of the State; *The City of Norwalk*, (1893) 55 Fed. 98. Like the instant case, the argument was made that there could be no recovery in the cited case for loss of life because there was no liability therefor under the general maritime law and it was not competent for state legislation to change the law in maritime cases (see text 55 Fed. 103). Judge Brown found the argument to be without merit, saying, among other things (text 107, 112):

"Still further, it must be borne in mind that the maritime law is not in itself a complete and perfect system. In all maritime courts there is a considerable body of municipal law that underlies the maritime as the basis of its administration. Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary, fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, i. e., from the municipal law, which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects. These general rights and regulations of persons and property are subject to the control of the state and may be changed as the state sees fit, if they are not regulated by congress and do not trench upon its exclusive authority. \* \* \*

"It was upon the recognition of this principle alone, as I understand, that in the case of *The Harrisburg*, 119 U. S. 199, 213, 7 Sup. Ct. Rep. 140, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority; namely, *because there is no rule on this subject belonging specially to the maritime law as such. 'It (the maritime law) leaves the matter untouched.'* Page 213, 119 U. S., and page 146, 7 Sup. Ct. Rep. And since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common law of this country such a cause of action does not survive—the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty (Emphasis ours).

\* \* \* \* \*

"In the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, the libel was dismissed, not be-

cause of any lack of jurisdiction, but because of the absence of any act of congress creating the right; and because 'the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched,' and the subsequent absence of any distinct rule in the maritime code; and therefore the courts of admiralty, it was held, must take their rule on that subject from the municipal law. *From that decision it necessarily follows that within the sphere in which the municipal law is valid and operative, viz., within the navigable waters of the state, the state law, in the absence of any act of congress, as to the survival of any such right of action, or any distinctively maritime rule applicable to the case, must furnish the rule of law as to the right of recovery.* And this in effect is precisely what was said and applied in the case of *The Corsair*" (Emphasis ours).

Likewise, the Honorable William H. Taft, then a Circuit Judge, with like reasoning, applied the death statute of Canada in a proceeding *in personam* where the death occurred upon Canadian waters (*Robinson v. Det. & C. Steam Nav. Co.*, (1896) 73 Fed. 883). In speaking of Judge Brown's opinion he said that "The authorities which he masses and the reasons which he arrays in support of his conclusions leave nothing to be desired" (Text 893).

The views expressed in *The Harrisburg* and *The Corsair* were inevitably followed by this Court in *Western Fuel Co. v. Garcia*, (1921) 257 U. S. 233, an admiralty suit to recover damages for negligent death. In that case this Court, by Mr. Justice McReynolds, again pointed out that (257 U. S., at 240):

"\* \* \* At the common law no civil action lies for an injury resulting from death. *The maritime law as generally accepted by maritime nations leaves the matter untouched* and in practice each of them has applied the same rule for the sea which it maintains on land. *The Harrisburg*, 119 U. S. 204, 213, 7 S. Ct.

140, 30 L. Ed. 358; *The Alaska*, 130 U. S. 201, 209, 9 S. Ct. 461, 32 L. Ed. 923; *LaBourgonne*, 210 U. S. 95, 138, 139, 28 S. Ct. 664, 52 L. Ed. 973" (Emphasis ours).

The Court affirmed the power of the States to make some modifications or supplements and held that where death follows from a maritime tort committed upon navigable waters of a State whose statutes give a right of action therefor, a libel *in personam* would lie because the subject, while maritime, is local in character and would not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. As a result it was held that the District Court had jurisdiction but that the action was barred by the State statute of limitation.

It seems clear from these decisions that as to the question whether or not a cause of action survives the death of the injured person or the tort-feasor, there is no rule that belongs especially to the maritime law as such. The question belongs to the general body of the municipal law which regulates the ordinary fundamental rights of persons and property on land and sea, and which underlies the maritime law as a basis of its administration.

In the absence of an Act of Congress or a statute of a state, it is the common law and not an independent existing system of maritime law which furnishes the applicable principles controlling abatement or survival of actions in admiralty. Whitlock, "A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Facts," (1908) 22 Harvard Law Review 403, 407, shows that "*actio personalis moritur cum persona*" was not part of the law of the Continental countries either afloat or ashore. Hughes on Admiralty (2nd Ed.), pages 224 to 227, is to the same effect. Mr. Justice Holmes has consistently pointed out the fact that the maritime law

"is not a *corpus juris*." It has never been considered as a complete and all-inclusive body of substantive law distinct from and co-extensive with the common law itself. The maritime law may be, and often is, supplemented by the common law. Thus, as pointed out by Mr. Justice Holmes (244 U. S., at 220), common law principles were applied in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, to sustain a libel *in personam* for personal injuries suffered while loading a ship.

Unlike the common law, the American maritime law is not derived from English jurisprudence but rather from the general maritime law adapted to our circumstances and molded by our practice (Benedict on Admiralty, 6th Ed., p. 9). As said by Mr. Justice Holmes, "there is no mystic overlaw" (*The Western Maid*, (1922) 257 U. S. 419). This explains why in *The Harrisburg*, this Court first held that in so far as the rule "*actio personalis moritur cum persona*" is concerned, each country followed the same rule for the sea as it did on land and, thereupon followed the common law in the absence of a State statute to the contrary. There being no special maritime rule and no statute, the maritime law was merely supplemented by the common law.

It has often been said that there is no general common law of the United States. *Wheaton v. Peters*, 8 U. S. (Pet.) 591; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; *Erie R. Co. v. Tompkins*, 304 U. S. 64, where it is said (304 U. S., at 78):

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of com-



mon law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The only inference is that, while Congress remains silent, the maritime law is supplemented by the common law, and in the United States that means the common law of the State. *Sherlock v. Alling*, 93 U. S. 99; *Taylor v. Carryl*, 20 U. S. (How.) 583. Even when admiralty has unquestioned jurisdiction; the commonlaw may have concurrent authority and the state courts concurrent power. *Schoonmaker v. Gilmore*, 102 U. S. 118:

Accordingly, while the general principles of admiralty law follow the common law in refusing to recognize any right of action in the absence of a state statute, the admiralty courts have given effect to the various death statutes of the different states without regard to whether the action was originally brought in the state court at common law (*American Steamboat Co. v. Chace*, 16 U. S. (Wall.) 522; *Sherlock v. Alling*, 93 U. S. 99) or in the federal admiralty court (*The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 94; see *The Corsair*, 145 U. S. 335).

Merely because a state statute may affect a ship or subjects over which admiralty has jurisdiction does not invalidate it. There are many cases in which there are concurrent remedies in the state and admiralty courts. There can be no question of the right of a state to give a common-law action, even for a cause maritime by nature. Thus, as early as 1873, this Court, in *American Steamboat Company v. Chace*, 16 Wall. 522, a suit at common law for a death in the waters of Rhode Island caused by a marine collision, held the Rhode Island statute valid notwithstanding the argument that the cause of action was maritime by nature and that the statute was an infringement of the exclusive admiralty jurisdiction of the federal

courts. Mr. Justice Clifford suggested that enforcement of the State statute did no more than "take the case out of the operation of the common law maxim that personal actions die with the person."

In *Sherlock v. Alling*, 93 U. S. 99, decided four years later, an action at law was brought under the Indiana statute to recover damages for death upon the Ohio River. It was argued that by both the common law and the maritime law the right of action for personal torts dies with the person, that the statute which allowed actions for such torts when resulting in the death of the person injured, enlarged the liability of parties for such torts, and if applied to marine torts would impose a new burden on commerce. This Court, however, held the statute valid, saying (93 U. S., at.....):

"\* \* \* It only declares a general principle respecting the liability of all persons within the jurisdiction of the State, for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water.

\* \* \*

\* . \* . \* \* \*

"\* \* \* Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and *the laws of the State govern*. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the Legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force up-

on citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. \* \* \*” (Emphasis ours).

Until the decision in *The Hamilton*, 207 U. S. 398, in 1907, no ruling had been made by this Court holding that a State could by statute abolish the common law rule and create such a liability enforceable in admiralty. That was a proceeding to limit liability for deaths from a collision at sea off the coast of Virginia. Both vessels were from Delaware, which had enacted a statute providing that actions for personal injuries shall not abate with the plaintiff's death, and providing a right of action if the plaintiff dies before suit. It was argued on behalf of the shipowner that the relations of the parties should not in admiralty be regarded as fixed by the laws of a State where the injury occurs upon the open sea through a purely marine tort, and that the liability for wrongs committed outside of territorial waters should be decided by the rules of admiralty as administered by the Federal forum, which gives no damages for death. And it was further urged that no State can by legislation destroy the harmony and uniformity of the Federal maritime law.

The arguments in *The Hamilton*, *supra*, and in *Sherlock v. Alling*, *supra*, are, in many respects, identical with the argument relied upon by the Respondent in the case at bar. But notwithstanding the argument in *The Hamilton* case, the District Court, the Circuit Court of Appeals and this Court each successively ruled in favor of the validity and enforceability of the statute. When the case was before the Circuit Court of Appeals, that Court gave effect to the Delaware statute, saying: (146 Fed. 727):

“We cannot doubt that had suits been brought for these deaths in the courts of Delaware the plaintiffs would have succeeded. By the action of the petitioners they are enjoined from prosecuting their

claims in the home forum and are compelled to present them here.

*"Every consideration based on equity and natural justice impels us to hold that it was not the purpose of the limited liability act to enable vessel owners to force claimants into the admiralty, and thus avoid claims which are valid and enforceable at common law. The intent was to limit the liability, not to destroy it" (Emphasis ours).*

Thereafter, certiorari was granted. This Court, in an opinion by Mr. Justice Holmes, affirmed that decision and its reasoning, saying (207 U. S. 398, at 404):

"\* \* \* The doubt in this case arises as to the power of the states where Congress has remained silent.

"That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789 (1 Stat. at L. 77, Ch. 20, Sec. 9), 'saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it' (Rev. Stat., Sec. 563, Cl. 8, U. S. Compt. Stat., 1901, p. 457), leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always had been admitted. *Martin v. Hunter*, 1 Wheat. 304, 337, 4 L. Ed. 97, 105; *The Hine v. Trevor* (*The Ad-Hine v. Trevor*), 4 Wall. 555, 571, 18 L. Ed. 451, 456; *Leon v. Calceran*, 11 Wall. 185, 20 L. Ed. 74; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. Ed. 159, 166, 11 Sup. Ct. Rep. 559. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature."

Although the Death on the High Seas Act of March 30, 1920, Ch. 111, 46 U. S. C. A., Secs. 761-768, has superseded some of these decisions, the principle they establish has never been repudiated. The Act does not alter the prior law in so far as the Great Lakes and the territorial

waters of the States are concerned; but, by its own terms, the Act expressly excludes its operation within State waters (For further discussion, see *infra*, page 20). The law of the place where the injury occurs determines whether or not the claim for damages survives. *Ormsby v. Chace*, 290 U. S. 387. See also the American Law Institute Restatement of "Conflict of Laws," Section 404, where under the heading "Tort in Territorial Waters," the rule is stated to be that:

"Liability for an alleged tort committed on board a vessel while the vessel is in the territorial waters of a state is determined, except as stated in Section 405, by the law of that state."

The mere fact that this law is declared by the highest court in a decision, rather than by the Legislature in a statute, is not a matter of Federal concern. *Erie R. Co. v. Tompkins*, 304 U. S. 64.

In Florida (by common law and by statute) a cause of action for personal injury *survives* the death of either the party injured or the tort-feasor. See Acts of Florida, Nov. 23, 1828, Sec. 30, being Sec. 4211, C. G. L., 1927; *Waller v. First Savings & Trust Co.*, (1931) 103 Fla. 1025, 138 So. 780; *Granat v. Biscayne Trust Co.*, (1933) 109 Fla. 485, 147 So. 850; *Penn v. Pearce*, (1935) 121 Fla. 3, 163 So. 288; *International Shoe Co. v. Hewitt*, (1936) 123 Fla. 587, 167 So. 7; and *State v. Parks*, (1937) 129 Fla. 50, 175 So. 786.

It is well known that State statutes giving a right of action for wrongful death fall under two classes. One class recognizes the rights of the *deceased* to sue for the injury inflicted and provides that such right of action shall survive, thus simply abolishing the common-law rule. These are called "survival acts." The other class gives a new right of action to *the parties injured by the death*, such as dependents, for the loss to them. These are called "death acts."



The right to enforce either a survival act or a death act, in admiralty, is now so well settled as to admit of no argument. *Vancouver S. S. Co. v. Rice*, (1933) 228 U. S. 445. We have been unable to find a single case where an admiralty court has refused to enforce a statute giving a remedy for wrongful death because it was a "survival statute" as distinguished from a "death act."

There is no distinction between a "death act" and a "survival statute" in so far as concerns the abolition of the common law rule "*actio personalis moritur cum persona*" and the effect of such statutes upon the maritime law.

At common law, and in the maritime law which in the absence of a statute followed the common (municipal) law, there was no cause of action, if, and after, either the injured person or the tort-feasor died. The cause of action abated upon the death of either party, and there was neither survival nor revival. It cannot be said that death acts did not invade the law in the field of personal injuries, since there can be no cause of action under the death acts unless the negligence was such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action and recover damages for his injuries. This Court has held in the case of a death act, giving a new action, that "the foundation of the right of action is the original wrongful injury to the decedent." *Michigan Central R. Co. v. Vreeland*, (1913) 227 U. S. 59. Death acts and survival acts both have a direct relationship to personal injuries and both provide a remedy for personal injury done to another. Neither can it be contended that death acts "do not modify" the existing maritime law which, in the absence of such statute, followed the common law. Before the passage of State "death" and "survival" acts there was no cause of action for wrongful death to be enforced. Likewise, there was no existing cause of action for personal injuries, if and after the tort-

feator died. State death acts changed, modified and supplemented the common law rule, followed in admiralty, by giving a cause of action for wrongful death (with right to recover damages for such death and, in certain instances, the right to recover damages which the injured person might have recovered if he had lived) where none had existed before, or else providing for the survival of decedent's cause of action. The effect of State statutes providing for survival of causes of action for personal injuries (not resulting in wrongful death) must necessarily be to likewise supplement the common-law rule followed in admiralty in the absence of such statute by giving a substantive right, enforceable by common-law remedy, where such right had not theretofore existed.

As shown by the cases herein cited, it is competent for the States to pass such statutes providing a remedy for personal injuries resulting in wrongful death, and they will be recognized and enforced in admiralty courts, without regard to whether they are death acts creating a new cause of action or survival acts continuing the original cause of action.

That the majority decision of the Circuit Court of Appeals is erroneous in refusing to give effect to the Florida statute is not only amply demonstrated by the cases already cited but also by the language of the Court in the case of *In re Long Island, etc., Transportation Co.*, (D. C. 1881) 5 Fed. 599. In that case, while limiting liability for wrongful death, the Court said (text 608):

"It has been seriously doubted whether the rule of the common law, that a cause of action for an injury to the person dies with the person, is also the rule of the maritime law. There is some authority for the proposition that it is not, and that in admiralty a suit for damage in such a case survives. *The Sea Gull*, 2 L. T. R. 15; *Cutting v. Seabury*, 1 Sprague 522; *The Guldfare*, 19 L. T. R. 7480; *The Epsilon*, 6 Ben.

381. But, however it may be in respect to the original jurisdiction of admiralty courts, I see no valid reason why the right of a person to whom, under the municipal law governing the place of the transaction and the parties to it, the title to the chose in action survives or a new right to sue is given for damages resulting from a tort, the admiralty courts, in the exercise of their jurisdiction in personam over marine torts, should not recognize and enforce the right so given. It has been held by the Supreme Court that such legislation by a state as applied to marine torts does not, in the absence of a commercial regulation by Congress covering the same field, intrench upon the exclusive powers given to the general government. *Steamboat Co. v. Chase*, 16 Wall. 552" (Emphasis ours).

*The Corsair*, (1892) 145 U. S. 335, illustrates that a survival statute is valid and enforceable in an admiralty court. There the claim was based solely on the Louisiana Code providing for the survival of actions for injuries resulting in death. The libel was *in rem* and while the court affirmed a dismissal of the libel because the Louisiana statute gave only a remedy *in personam* and not a remedy *in rem*, nevertheless, in discussing the applicable law, this Court said (145 U. S., at 347):

"In much the larger class of cases, the lien is given by the general admiralty law, but in other instances, such for example as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the district court may administer the law by proceeding in personam, as was done with a claim for half pilotage dues under the law of New York, in the case of *Ex parte McNeil*, (U. S.) 13 Wall. 237 (20:624), but unless a lien be

given by the local law, there is no lien to enforce by proceedings *in rem* in the court of admiralty" (Emphasis ours).

The Louisiana survival statute (which was considered in *The Corsair*, *supra*), giving to a survivor the right of action for the damages which the deceased might have recovered had he survived the injury, was later upheld and enforced *in personam* by the admiralty courts.

The Louisiana survival statute came before the court in *The Albert Dumois*, (1900) 177 U. S. 240, a proceeding for limitation of liability. The admiralty court upheld and enforced a claim for a wrongful death, based upon that statute.

In *Quinette v. Bisso et al.*, (1905) 136 Fed. 825 (certiorari denied 199 U. S. 606), the Circuit Court of Appeals for the Fifth Circuit recognized and enforced that survival statute of the State of Louisiana. The District Court had dismissed, on the ground of contributory negligence, a libel *in personam* to recover damages, brought under the Louisiana statute, resulting from the drowning of libelant's daughter. In reversing the lower court upon its finding of contributory negligence and directing entry of judgment for the libelant, the Circuit Court of Appeals recognized the State statute as giving the right of action, making contributory negligence a defense, if proved, and fixing the measure of damages to include those which the deceased might have recovered, saying (136 Fed., text 838):

"The right of action here is given by Article 2315 of the Civil Code of Louisiana, as amended in 1884, which declares that:

"Every act whatever of men which causes damages, obliges him by whose fault it happens to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the

deceased or either of them, and in default of these in favor of the surviving father and mother, or either of them, for a space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent and child, or husband and wife, as the case may be.

"Without this statute the libelant could not maintain her libel. *The statute must be applied in admiralty just as if the suit had been brought in the state court*, and any defenses which are open to the defendant under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel" (Emphasis ours).

It is noteworthy that in the Quinette case, the admiralty court not only adopted and enforced the State statute, but held that it was controlled by the decisions of the State courts in construing the statute; and, that the admiralty court adjudged in one lump sum the aggregate damages to be recovered, which included under the express terms of the statute "the damages which the deceased could have recovered had she survived the injury."

In holding (upon authority of the District Court cases of *Crapo v. Allen*, Fed. Cases No. 3360, and *In re Statler*, 31 F. 2d 767), that the common law principle "that causes of action for personal injuries die with the person" is also the general maritime law which cannot be modified or supplemented by a State survival statute, the Circuit Court of Appeals refused to follow, and conflicted with, the applicable decisions of this Court. Neither of the cases cited by the Circuit Court was in point. In the early case of *Crapo v. Allen*, *supra*, the injury for which suit was brought occurred upon the high seas and not in the territorial waters of Massachusetts. There was nothing to show (as in *The Hamilton*, *supra*) that Massachusetts was the State of the ship's flag. The general statements of District Judge Sprague in that case have not been sustained by subsequent cases and are directly contradicted



by *The Harrisburg, supra*, *The Corsair, supra*, *Western Fuel Co. v. Garcia, supra*. Furthermore as pointed out in *American Steamboat Co. v. Chace*, 16 U. S. (Wall.) 522, by Mr. Justice Clifford, "Judge Sprague also applied the same rule in the case of *Crapo v. Allen*, 1 Sprague 184, but in a later case he left the question open, with the remark that it cannot be regarded as settled law that an action cannot be maintained in such a case. *Cutting v. Seabury*, 1 Sprague 522."

The case of *In re Statler, supra*, is not in point and does not support the principle for which it was cited. The cited case, being a suit founded on the Seaman's Act, 41 Stats. 1007 (1920, 46 U. S. C. A. 688), is merely authority to the effect that where a cause of action is given by a Federal statute, the principles of the common law (not maritime law) will determine whether such action survives when nothing is said in the Statute itself about survivorship. See *Schreiber v. Sharpless*, 110 U. S. 76, and cases cited in the Statler opinion. The respondent asserts that this case holds "that the abatement took place by reason of the maritime law" (Br. 10) and that "Judge Knox's remarks with respect to the common law were made after he had already disposed of the case by reason of the maritime rule" (Br. 11). We most emphatically disagree with the respondent's construction of that case and submit that the opinion, when read as a whole, does not support such a statement. The case was squarely decided upon the following language (31 F. 2d, at 769):

"The right of the representatives of the deceased seamen to claim damages for their deaths is original, and not derivative (*Michigan Central R. R. v. Vreeland*, 227 U. S. 59, 68, 70, 33 S. Ct. 192, 57 L. Ed. 417), and, as here asserted, came into existence merely as a result of the provisions of Section 20 of the Seamen's Act, as amended (46 U. S. C. A., Sec. 688). That statute, in terms at least, does not in-

dicare that, aside from the specific exceptions with which it deals, the causes of action which it authorizes shall be measured or characterized by any standard other than that of the common law. See *Willey v. Alaska Packers Association*, (D. C.) 9 F. 2d 937; *Sullivan v. Associated Billposters*, (C. C. A.) 6 F. 2d 1000-1004, 42 A. L. R. 503. Under the common law, it is familiar doctrine that an *ex delicto* action abates upon the death of the party charged with wrong and cannot be revived against his representatives. 1 *Corpus Juris* 163. See *Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25, and *Matter of Meekin v. B. H. R. R. Co.*, 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635."

From this language, it is obvious that the case does not support the principle for which it was cited by a majority of the Circuit Court of Appeals and by the respondent here.

It is significant to note that the majority opinion of the Circuit Court of Appeals, while refusing to apply the principles announced in *The Harrisburg*, *supra*, *The Hamilton*, *supra*, *Western Fuel Co. v. Garcia*, *supra*, and other cases decided by this Court, upon the ground that "Decisions about death claims sustained in admiralty are not at all in point" (R. 866), nevertheless based its own contrary conclusion upon cases directly involving "death claims sustained in admiralty:"

It is respectfully submitted that the majority opinion and the decision of the Circuit Court of Appeals that the common law rule "*actio personalis moritur cum persona*" has been adopted as a part of the general maritime law and therefore cannot be modified or supplemented by a State survival statute, is erroneous because it is contrary to and in conflict with the above cited decisions of this Court.

### Reply to Respondent's Argument.

In an attempt to show the existence of a distinct general maritime rule that causes of action for personal injuries die with the person, the respondent (Br. 9) cites and relies upon *Cortes, Administrator, v. Baltimore Insular Line, Inc.*, (1932) 287 U. S. 267. This case does not aid the respondent. It was not a suit in admiralty but an action at law brought by the administrator of a deceased seaman under the provisions of the "Jones Act" to recover damages for his death alleged to have been negligently caused by the failure of the master to give the seaman proper care. The case dealt with the extent the ancient maritime rights of a seaman had been changed by the "Jones Act," which act gives a cause of action to a seaman who has suffered personal injury through the negligence of his employer, and if death results from such injury, gives a cause of action to the seaman's personal representative. As stated by this Court, the only question presented for decision was (287 U. S., at 372):

"\* \* \* We are to determine whether death resulting from the negligent omission to furnish care or cure is death from personal injury within the meaning of the statute."

The respondent next attempts to justify the reliance placed by the majority of the Circuit Court of Appeals upon the case of *In re Statler, supra*, and *Crapo v. Allen, supra* (Br. 10-15). We do not believe that these cases require any further discussion inasmuch as we have herein, *supra*, pages 25, 26, demonstrated that neither of these cases is in point.

The respondent attempts to overcome *The Harrisburg, supra*, *The Corsair, supra*, and *Western Fuel Co. v. Garcia, supra*, upon the supposed distinction that these cases "were cases involving causes of action for death" and "were not concerned with the abatement of maritime causes of action for personal injury" (Br. 19). Such

argument is untenable since it conclusively appears that there is no distinction between a death act and a survival statute in so far as concerns the abolition of the common law rule "*actio personalis moritur cum persona*" and the effect of both classes of statutes upon the maritime law.

Respondent argues that Congress, in passing the Death on the High Seas Act (Tit. 46, U. S. C. A., Secs. 761-768), occupied the field of survivorship; and by providing for revival of actions for wrongful death upon the high seas and by merely preserving state acts, Congress purposely excluded the operation of survival acts in state waters (Br. 22-26). This identical argument was also made to both the District Court and the Circuit Court of Appeals but was not adopted by either of them.

By its express terms, the federal death act is restricted to (1) "the death of a person," (2) "on the high seas beyond a marine league from the shore of any state" (Section 1); and (3) "the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State \* \* \*." This act did supersede state death statutes so far as they were applicable to death on the high seas—but the act itself excludes its operation within state waters and does not attempt to affect state statutes either giving or regulating (as by survival) actions for personal injuries resulting in a death upon navigable waters within the boundaries of a state. *Western Fuel Co. v. Garcia*, *supra*.

These matters are left as they stood prior to the passage of the act. *O'Brien v. Luckenbach S. S. Co.*, (C. C. A., 1923) 293 Fed. 170. There is nothing in the act itself to indicate that it was the intention of Congress to exclude all other remedies theretofore existing. *Powers v. Cunard S. S. Co.*, (D. C. N. Y., 1925) 32 F. 2d 720.

The act itself indicates a carefully devised congressional plan to leave unaffected the operation of state statutes over state waters. *Echavarria v. Atlantic, etc., Nav. Co.*, (D. C. N. Y., 1935) 10 Fed. Supp. 677.

It clearly follows that Congress has never, even partially, occupied the field of survivorship or revivorship of causes of action or actions where the personal injuries resulting in death occurred upon *state waters* as distinguished from those occurring upon *the high seas*. The result must, therefore, be that with respect to survivorship of all actions for personal injuries, including those injuries resulting in death, sustained on navigable waters within a state—the law of such state is operative and will be applied in admiralty.

Respondent argues that a situation analogous to the "High Seas Death Act" is found with respect to the "Employers' Liability Acts" and cites *St. Louis, etc., Railroad Co. v. Hesterly*, 228 U. S. 702 (Br. 25); *New York Central Railroad Co. v. Winfield*, 244 U. S. 147, and *Lingren, Administrator, v. United States et al.*, 281 U. S. 38 (Br. 26), holding that the failure of Congress to there provide for survival could not be aided by state laws. Those cases disclose that Congress in passing the "Employers' Liability Act" intended it to be *comprehensive and exclusive*, covering the entire subject of liability of a railroad to an employee in interstate commerce. The analogy is not supported. As we have shown, the Death on the High Seas Act does not purport to cover the entire field of personal injuries upon navigable waters, but is expressly limited to personal injuries resulting in death upon *the high seas*—thereby leaving undisturbed the operation of state statutes in territorial waters.



## POINT B.

**The Majority Decision Refusing to Give Effect to the Florida Statute and Common Law Providing for Survivorship of Actions for Personal Injuries Because to Do So Would Impair the Uniformity of Admiralty Is in Conflict with Applicable Decisions of This Court and Is Erroneous.**

This Court has never decided whether admiralty courts will give effect to the statutory and common law of a State providing for survival of actions and permit enforcement of a claim *in personam* against a deceased tortfeasor's estate for personal injuries sustained upon the territorial waters of the State. Despite the importance of the question involved, there is no decision of any court (other than the case at bar) directly upon the point. There are, of course, many decisions of this Court holding that effect is to be given in admiralty to a State statute (some of which are "death acts" and some "survival acts") providing a remedy for wrongful death. The majority of the Circuit Court of Appeals held that these cases were not in point and refused to apply the principles announced in them (R. 866). No valid distinction exists between a death act and a survival statute as to the effect upon maritime law. The death cases decided by this Court are not only applicable to this case, but the principles therein announced control this controversy. The majority opinion and the decision of the Circuit Court of Appeals is untenable and in direct conflict with those decisions of this Court.

No State legislation is valid if it contravenes the essential purpose expressed by an Act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and unity of that law in its international and interstate relations. This Court has held that with respect to those activities directly connected with commerce and

navigation in their interstate and international aspects, the law must be uniform throughout the United States, and the various States may not modify or vary it. *Southern Pac. Co. v. Jensen*, 244 U. S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. The able dissents of four Judges in each of the above cases, led by Mr. Justice Holmes, clearly show, however, that the maritime law has not preempted the entire field of personal injuries but, on the contrary, State statutes applying a remedy where there was none before (as in the instant case) will be recognized and enforced in admiralty. It is well settled that though the contract or tort is maritime, yet, if it is local in character and has no direct relationship to navigation, State laws are applicable to determine rights and liabilities and to regulate the method of seeking relief because they do not work material prejudice to any characteristic feature of the maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Western Fuel Co. v. Garcia*, 257 U. S. 233; *Ghent Smith-Porter Co. v. Rohde*, 257 U. S. 469; *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 51; *Carlin Constr. Co. v. Heaney*, 299 U. S. 41.

What is meant by a case not prejudicial "to any characteristic feature of the general maritime law" is expounded in the language of the decision in *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 51 (1926), as (270 U. S., at 64):

"Regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

In the instant case the petitioners were not seamen (R. 2, 28, 33, 829). All of the parties were residing in Florida at the time, and the vessel was continuously at all times in State waters (R. 830). The captain and the engineer had their homes in Florida (R. 453), and Yeiser, the owner, lived aboard the vessel (R. 826). The vessel was docked at Miami, Florida, and Ft. Myers, Florida (R. 464). The trip was for pleasure and not for commerce. No fares were paid nor any money earned by operation of the yacht (R. 829). It does not appear that the vessel was engaged in commerce—interstate or of any other kind.

A tort action for wrongful death has no relationship to navigation, no characteristic features of maritime law are prejudiced thereby and there is no necessity for uniformity because the subject is local in character. Thus in *Western Fuel Co. v. Garcia*, 257 U. S. 233, this Court in affirming the right to sue in admiralty to recover damages by virtue of a State death statute, said (257 U. S., at 241, 242):

"In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, we have recently discussed the theory under which the general maritime law became a part of our national law and pointed out the inability of the states to change its general features so as to defeat uniformity—but the power of a state to make some modifications or supplements was affirmed. \* \* \*

"As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the ad-

miralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. *The subject is maritime and local in character* and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern Pacific Co. v. Jensen, supra*" (Emphasis ours).

Such holding that "*the subject*" (being personal injuries resulting in death by wrongful act upon State waters) *is maritime and local in character*, is equally applicable where the "*subject*" is "personal injuries from wrongful act upon State waters not resulting in death."

Such a conclusion was reached in *Buttner v. Adams et al.*, (C. C. A. 9, 1916) 236 Fed. 105, where, in reversing a decree of the lower court which had dismissed a libel to recover for personal injuries, the Court of Appeals said (text 108):

"While the admiralty jurisdiction cannot be enlarged by State enactment (*The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654), it is well settled that the maritime law may be changed by state enactment conferring rights of action arising out of marine torts resulting in death (*The Hamilton*, 207 U. S. 398, 28 S. Ct. 133, 52 L. Ed. 264; *LaBourgogne*, 210 U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973). Such being the case as to torts resulting in death, no good reason is seen why the admiralty court may not have jurisdiction of a cause to recover damages for personal injuries resulting from a marine tort against those whom the State law declares shall be primarily liable to respond in damages therefor. \* \* \* We hold that a liability so created by state law and arising out of a marine tort is subject to the jurisdiction of a court of admiralty. It is believed that this view of the question does not contravene any decision of a federal

court, or result in prejudice to the uniform administration of maritime law" (Emphasis ours).

Mr. Justice Holmes, in *The Hamilton*, 207 U. S. 398 (*supra*, pp. 18-19), has permanently and adequately disposed of any concern over interference with uniformity, saying (207 U. S., at 405):

"We pass to the other branch of the first question—whether the state law, being valid, will be applied in the admiralty. Being valid, it created an obligation—a personal liability of the owner of the *Hamilton* to the claimants. *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 126, 48 L. Ed. 900, 902, 24 Sup. Ct. Rep. 581. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624, 626. It might not give a proceeding *in rem*, since the statute does not purport to create a lien. It might give a proceeding *in personam*. *The Corsair (Barton v. B. own)*, 145 U. S. 335, 347, 36 L. Ed. 727, 731, 12 Sup. Ct. Rep. 949. If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity. Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit" (Emphasis ours).

No distinction in principle and reasoning from the point of view of uniformity can be made between a survival statute and a wrongful death statute of which Mr. Justice Holmes was speaking. Nevertheless, in the instant case, the majority opinion of the Circuit Court of Appeals refused to recognize or follow either the reasoning of Mr. Holmes or the later decision of this Court in *Western Fuel Co. v. Garcia*, *supra*, pp. 13, 33.

The opinion of the trial judge in the present case (R. 823) illustrates and follows the reasoning of the authorities here cited. Judge Holland said:



"As to a conflict with the uniformity required by the United States Constitution in regard to admiralty matters, I do not think the point is well taken because such uniformity is no more stricken down by a survivorship statute in regard to personal injury damages than by recognition of the right of action for death. In other words, if there is a statute in Florida, which there is, giving rise to a new action for death, and should there be no such statute in another state, for instance, South Carolina, certainly there would be a lack of uniformity there, yet that lack of uniformity is not held to be in conflict with the constitution. Likewise the survivorship of a personal injury damage is recognized by a Florida statute, and suppose the same is not recognized by a South Carolina statute. The same lack of uniformity exists, but in my opinion this lack of uniformity is not in conflict with the constitutional provisions of uniformity required of admiralty."

Another trial judge in an earlier case stated and applied the rule in admiralty, as announced by Mr. Justice Holmes. See *Amoth v. United States et al.*, (D. C. Ore., 1925) 3 F. 2d 848.

As to its effect upon any characteristic feature of the maritime law, there is no distinction between a death act and a survival statute. It clearly appears from the cases cited herein that a state may pass a statute providing a remedy for personal injury resulting in wrongful death and that such statute will be enforced in a court of admiralty, without regard to whether it is a death act creating a new cause of action or a survival act continuing the same cause of action. See also *The City of Belfast*, (D. C. Penn., 1905) 135 Fed. 208, where the Court held that the Pennsylvania statute involved in that case merely continued a common law right of action for personal injury after the plaintiff's death and hence, under such statute, a libel in admiralty against a ship for injuries did not abate upon the libellant's death but might

be continued in the name of his personal representative.

From the decisions of this Court, it is seen that no violation of uniformity of maritime law is involved in giving effect to the Florida common law and statute under which petitioners' causes of action for personal injuries survived the death of the tort-feasor, Yeiser. The cause of action *in rem* against the yacht was not affected by the death of its owner (*The Ticelene*, 208 Fed. 670). There also existed a cause of action against the owner in his lifetime. The Florida common law and statute make no attempt (as in death cases) to introduce into admiralty a new and strange kind of cause of action. On the contrary they merely preserve and confirm to injured persons, notwithstanding the death of the tort-feasor, the identical cause of action which maritime law, as well as the common law of Florida, gave to such persons, so that courts of admiralty, following the Florida common law and statute, may continue to enforce such causes of action.

Precisely the same reasoning and argument used by the deceased tort-feasor's executrix here, and adopted by the majority of the Circuit Court of Appeals in refusing to give effect to the Florida law, was advanced against the enforcement of State death acts, in *Sherlock v. Alling*, 93 U. S. 99. There, this Court, as early as 1876, held such reasoning and argument to be untenable and entirely devoid of merit.

Here the petitioners were already asserting their common-law remedy for the enforcement of their causes of action against the estate. They have never invoked the admiralty jurisdiction nor asserted a maritime lien against the yacht but were forced into the admiralty court by the petition of the executrix for limitation of liability (which was strictly a defensive maneuver) and they were not only forbidden to go elsewhere but were commanded to file their claims in season or else get nothing. The limitation proceeding, however, was one essentially *in rem*.

and *in personam*, binding the owner's property as well as his person and furnishing a complete remedy for all claims, whether strictly in admiralty or not; *Hartford Accident & Indemnity Co. v. Southern Pac. Co.*, 273 U. S. 207. Having once acquired jurisdiction, both *in rem* and *in personam*, the admiralty court was competent to give petitioners a complete remedy not only against the yacht but also against the deceased tort-feasor's estate.

The majority opinion and the decision of the Circuit Court of Appeals, in refusing to give effect to the Florida law, have refused to recognize the above cited applicable decisions of this Court, and by so doing have reached a decision which is erroneous and which directly conflicts with those decisions of this Court.

### Reply to Respondent's Argument.

The opinion of this Court by Mr. Justice Holmes in *The Hamilton*, 207 U. S. 398, *supra*, page 35, conclusively shows that the enforcement of a State survival statute will not produce such a lack of uniformity in the administration of the maritime law as to conflict with Constitutional requirements. Being unable to distinguish or otherwise answer this authority, the respondent here seeks to ignore that case and the principles of law there announced. We submit that *The Hamilton*, *supra*, controls the decision of this question.

Ignoring *The Hamilton*, *supra*, respondent argues: "We are concerned here with the right granted by the Federal maritime law, which depends on the Federal Constitution" and is in the nature of a Federal statute (Br. 27). From this fallacious premise respondent then argues that the survival of a cause of action must depend upon the will of Congress alone (Br. 29). The respondent completely overlooks the fact that at common law and in the maritime law following the common law there was no cause of action if and after either the in-

jured person or the tort-feasor died and that "no valid distinction from the point of view of uniformity can be made between a survival action and an action for wrongful death, of which the books are full. Here the injury occurred in the territorial waters of Florida and there can be no doubt that had a common law action been brought in Florida it could have been maintained. 2 C. J. S., Sec. 62, p. 124" (R. 871). The respondent also ignores the fact that even as to actions for wrongful death, some are based upon "death acts" giving a new right of action, and others are based upon State "survival acts" providing that the decedent's right of action shall survive. If there be any merit in respondent's argument, then State "survival acts" (such as the Louisiana statute) continuing the decedent's cause of action for wrongful injury resulting in death are unenforceable in admiralty. We have shown that the Louisiana survival act has been enforced in admiralty without question.

Respondent next attempts to distort our contentions, saying that our "absurd argument is constituted of two principles" and that we contend, first, that there is not a Federal maritime law, and, second, that therefore there cannot be any prejudice to its characteristic features or interference with its uniformity (Br. 29). We merely point out that we have not made any such contentions.

Respondent further contends that although State death acts are enforceable in admiralty there is "vital distinction" between a State death act and a State survival statute, the supposed distinction being that a death act creates a new right unknown to the maritime law, whereas survival statutes continue the same action (Br. 30, 31). This contention has been answered fully herein, *supra*, pages 20 and 21.

The respondent admits that: "However, if one assumes, as the petitioners do, that there is not an independent maritime rule of abatement of causes of action for personal injury, there is no problem, and there is, in-

deed, no difference between death statutes and survival statutes. If the rule applied in admiralty to abate personal causes of action is not a maritime rule but a rule of the common law, then, of course, any change in the rule is merely a change of the common law" (Br' 33). It is unnecessary to indulge such an assumption, inasmuch as we have shown in Point A, *supra*, pages 8 to 30, that the common law rule "*actio personalis moritur cum persona*" has never been adopted as a part of the general maritime law so as to exclude the operation of a State survival statute, and that a State statute abrogating such rule will be enforced in admiralty.

Respondent's assertion, "that actions for death have nothing to do with personal injuries," refutes itself; because, even in the case of a death act (as distinguished from a survival statute) "the foundation of the right of action is the original wrongful injury to the decedent." See *supra*, page 21, and *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59.

Respondent ends her argument upon this point by citing, and quoting from, *The Lafayette*, 269 Fed. 917, as "persuasive authority," and stating that we did not mention that case. We did not mention *The Lafayette*, because, first, it was urged at length upon the District Judge, who found specifically that the case did not sustain respondent's contentions; second, because the cited case was urged by respondent upon the Circuit Court of Appeals, but was not followed or mentioned by that Court; and, third, because the cited case is not in point and has no application here since it was a suit *in rem* against the vessel, as shown from the opinion, where it is stated (text 927):

"The principle, however, that death before judgment abates an action for personal injuries has no application to the facts of this case, which is not a proceeding *in personam*, but one *in rem*."



**CONCLUSION.**

We submit, in the language of the dissenting opinion by Circuit Judge Hutcheson, that "Admiralty should not here follow the traditional common law rule of an action abating with the death of the wrongdoer in view of its almost universal disapproval in and disappearance from the jurisprudence of American states and particularly in view of the fact that there is now no general federal common law but only the common law of the state where the particular court is sitting. Particularly should we not follow this ancient and discredited rule, in the face of the considerations of humanity, of reason and of common sense, together with the current of authority which now runs in favor of its abolition" (R. 872-873).

Upon the record and the cited authorities, we respectfully submit that the majority opinion and the decision of the Circuit Court of Appeals are erroneous, in that they conflict with applicable decisions of this Court, and that the judgment of the Circuit Court of Appeals should be reversed.

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Supreme Court of the United States

CHARLES HENRY DOOLEY  
CLERK

OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER,  
*Petitioners,*

ALMA CHAMBERS, as Executrix of the Estate of Henry C.  
Yeiser, Jr., as owner of the American Yacht *Friendship II*,  
*Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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VERNON SIMS JONES,

*Proctors for Respondent,*

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Borough of Manhattan,

New York City.

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# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST AND ANNE  
ELISE GRUNER,  
Petitioners,

v.

ALMA CHAMBERS, as Executrix of the  
Estate of Henry C. Yeiser, Jr., as  
owner of the American Yacht  
FRIENDSHIP II,  
Respondent.

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition, and the brief filed in support of it, ask for a review of a subject for which this court has already laid down the guiding principles in many decisions. The Circuit Court of Appeals, of whose decision the petitioners complain, did no more than apply those principles to the facts. The petitioners, while seeming to contend that there has been a misapplication of those principles, are really seeking to have the law changed in order to meet the supposed needs of one case.

This will be demonstrated in that portion of this brief which deals with the matters which the petitioners have chosen to bring to the court's attention. But, first, a preliminary reference should be made to matters which the

petitioners do not mention, or which are set forth in such a way that their true significance is obscured. There are four such matters.

Foremost of these is the statement which appears on page 4 of the petition, where it is said that the action of the Circuit Court of Appeals completely determined the rights and liabilities of the parties.

There is a measure of truth in this statement, but it serves to obscure the fact that the petitioners are asking for a review of a question of damages, which is not in the case now, but which the petitioners hope will be in the case when they shall prove their damages.

The appeal to the Circuit Court of Appeals was from an interlocutory decree of the District Court and was authorized by Section 129 of the Judicial Code, as amended April 3, 1926, 44 Stats. 233. When the Circuit Court of Appeals decided the case it held that the damages, when proved, should be limited to an amount not in excess of the value of the vessel concerned, or \$6,135.21. That amount, which had been realized from the sale of the vessel, was, and still is, on deposit with the District Court. R. 26, 38.

Up to the present there has been no finding, or proof from which a finding could be made, that the petitioners' damages equal the value of the vessel, to say nothing of being in excess thereof. Respondent asserts that they are less than that value, and, eventually, the District Court may so find. If so, the decision of the Circuit Court of Appeals will be academic.

The essence of petitioners' position is that the limitation on the amount of the possible damages should be removed before they have proved any damages at all.



There is no question as to the Supreme Court's jurisdiction in the matter, but whether the case is now ripe for the exercise of that jurisdiction, assuming that other circumstances are favorable, is another matter.

The second matter is concerned with the statement which appears on page 3 of the petition, where it is said that the Circuit Court "unanimously approved the findings of fact (R. 864) made by the District Judge (R. 825-835) and affirmed the decree insofar as it held that Yeiser was guilty of negligence and that the injuries were occasioned with his knowledge and privity (R. 865)."

The statement is true, but not sufficiently informative. It obscures the fact that, in addition to the matter which the petitioners now ask this court to review, there were two matters of importance which were argued before and decided by the Circuit Court of Appeals.

The first was whether there was evidence to justify the finding that petitioners had been overcome by carbon monoxide gas and had not been warned of the danger of such gas. With respect to this the Circuit Court held that "every finding of fact which the Judge made is supported by evidence." R. 864.

The second matter related to the duty which a host owes to his social guest when the guest is injured by reason of a defect in the premises of which the host does not have actual knowledge.

*Higgins v. Mason*, 255 N. Y. 104;

*Galbraith v. Busc*, 267 N. Y. 230;

*The Blue Moon III*, 60 F. (2d) 653;

*Restatement of the Law of Torts*, Vol. 2 §§331, 332, 341, 342.

With respect to this the Circuit Court, like the court below, held that the criterion of a host's liability to his guest was not what he actually knew but what he should have known. R. 865.

Both courts held that the yacht owner should have known of the defect which was held to have caused the injury and should have warned his guests, the petitioners. They also held that the petitioners had not been warned, although there was not a scintilla of evidence to support the finding. R. 833, 821, 865. The petitioners did not testify at all because they did not appear at the trial. The yacht owner could not testify because he was dead. No one else could say whether the petitioners were warned or not.

In spite of the concurrence of the District and Circuit Courts in deciding both of these matters against it respondent believes that they were wrongly decided. At the same time respondent has no reason to believe that the points involved are such as to make it likely that this court would grant certiorari. Therefore, the respondent has not, and will not, file a cross petition.

On the other hand, respondent is mindful of the remarks of this court in *Langnes v. Greene*, 282 U. S. 531, 535-539, wherein it was pointed out that this court has the power, in admiralty cases especially, to go beyond the matters which a petitioner may submit for review and to review other matters as well. It is submitted, therefore, that, should certiorari be granted, respondent would be entitled to urge the court to go beyond the narrow question of how much damages the petitioners may have and to decide whether they should have any at all.

Although the court may do as it sees fit in that regard, it is essential that it should be given full information now as to what the granting of certiorari may involve.

The third preliminary matter is concerned with the petitioners' method of setting forth the facts in such a way as to create the erroneous impression that the State of Florida was the only jurisdiction which had any concern with the events giving rise to this lawsuit. Whether the matters involved in this case are of mere local concern or not (assuming that to be of importance) depends on facts and not on artfulness in presentation.

For instance, petitioners say on page 25 of their brief that all the parties were residing in Florida at the time. It would be more accurate to say that they were in Florida temporarily, that the petitioners resided in St. Louis, Missouri, and that the yacht owner resided in Ohio. R. 109, 80. Indeed, he was an incompetent and his affairs were in the control of a guardian appointed by an Ohio court. R. 73.

Again, on page 2, it is said that the vessel was at all times within the territorial limits of the State of Florida. On page 25 it is said that the vessel was continuously at all times in state waters and that the vessel was docked at Miami, Florida and Fort Meyers, Florida.

If petitioners mean to say only that, while they were on board the vessel, it was at all times within Florida territorial limits, they are correct, for, although the cruise took the vessel about thirty miles south of Miami and at times more than three miles away from the nearest land, still it remained within the territorial limits of Florida as they are defined by the Florida Constitution. Exhibits 4A and 4B, introduced at R. 615, R. 610-613, 58.

On the other hand, if petitioners mean to convey the impression that the vessel was domiciled in Florida because sometimes it docked at Fort Meyers and sometimes

at Miami, they are inaccurate. As the record and exhibits will show, for two months previous to the cruise in which the petitioners participated the vessel had gone on other cruises during the course of which it had touched at various places in and off Florida. Sometimes it docked in Fort Meyers and sometimes it docked or anchored near places which were between Miami and Fort Meyers. Meanwhile it was "down on the Keys and cruising around." During the course of these cruises the vessel used Miami as a base for supplies. R. 464. Exhibit 2, introduced at R. 509.

Neither is there anything to support the suggestion that during these cruises the vessel remained at all times within the territorial limits of the State of Florida. The *Friendship II* was a substantial vessel, carried a crew of six and had two engines capable of propelling her at the rate of eight miles per hour. R. 365, 510, 658, 690, 694, 698, 449, 450. Exhibit 3, introduced at R. 545. She was certainly capable of going outside the territorial limits of Florida and in the course of the cruises which she made it is likely that she did.

The petitioners say that the vessel was not engaged in commerce, interstate or any other kind. If petitioners mean that she was not engaged in carrying goods or passengers for hire, they are correct. But that is not the only kind of commerce in which a vessel may be engaged. A vessel owned by a resident of Ohio which sails on cruises taking it in and out of Florida ports and requiring it to be victualled, manned and supplied in Florida, is engaged in commerce also, although its ultimate object may be pleasure.

Finally, the statement of facts makes no reference to the fact that the petitioner, if they suffered any injury at all, were caused to suffer it by reason of a defect in an

exhaust pipe, which, according to their claim, caused them to be overcome by exhaust fumes during the time the vessel's engines were being operated in the course of her navigation. The injury, according to the claim, arose directly out of the vessel's operation and navigation. R. 63-65, 521, 830.

The fourth matter of a preliminary nature concerns the statement that the petitioners' injuries were occasioned with the privity and knowledge of Yeiser, the yacht owner. R. 2. That was the finding of the courts below. R. 865, 832. But that should not be taken to mean that the yacht owner had any actual knowledge of the defect in the vessel's exhaust pipe which caused the petitioners' injuries. The privity and knowledge referred to were that which the law implies when a ship owner is personally present on his vessel when a tort occurs. R. 865.

Indeed, the matter of the yacht owner's privity and knowledge under the limitation of liability statute was not the subject of specific contest in either the District Court or the Circuit Court. The respondent contended that there had been no proof of negligence, first, because the duty of care which a host owes a social guest depends on what he actually knows and not on a constructive knowledge implied by law and, second, because, even though the case be judged by constructive knowledge, there was not a scintilla of evidence that petitioners had not been warned of the danger by somebody, if not by the yacht owner himself. When the District Court and the Circuit Court overruled respondent's contentions in this regard, and held that the yacht owner was liable because of a knowledge which he did not but ought to have had, that holding required the further



holding that, under the limitation of liability statute, he should have known of the defect and was therefore privy to the wrong.

## POINT I.

BY REASON OF THE MARITIME LAW, MARITIME CAUSES OF ACTION IN PERSONAM FOR PERSONAL INJURY ABATE WITH THE DEATH OF EITHER THE TORT FEASOR OR OF THE INJURED PERSON.

The majority of the Circuit Court so held. R. 868. The petitioners challenge this holding and say that it is in conflict with the decision of the Supreme Court in *The Harrisburg*, 119 U. S. 199.

This challenge is set forth at page 6 of the petition as the first reason for granting the petition. It is repeated on page 12 of the brief as one of the specifications of error. It is the basis of Point A of petitioners' argument.

It is of vital importance to the petitioners that the position which they have taken be sound. If it is unsound, there is nothing to the remainder of their argument.

For instance, if the maritime law *ex proprio vigore* provides that causes of action *in personam* for personal injury abate, that is not a procedural regulation but a regulation of substance and right. *Schreiber v. Sharpless*, 110 U. S. 76. Furthermore, if the nature of the right so given by maritime law is that it shall end on the death of either the tortfeasor or of the injured person, a continuation of the right after death can be accomplished only by changing the nature of the right itself. If one applies to the matter the analogy of *Ormsby v. Chase*, 290 U. S. 387, it follows that the power to make such a change resides in Congress only.

In that case it was held that the territorial jurisdiction which gives a cause of action is the only jurisdiction which has the power to abate it. Since petitioners' cause of action was given by the federal maritime law, its abatement was governed by the same law.

Seemingly, the petitioners recognize this, for they insist that, in so far as the maritime law has ever enforced a rule which has resulted in the termination of a cause of action on the death of a tortfeasor, it has been by reason of an application in admiralty of the common law of the land. Thus, they argue, there is no maritime rule that such causes of action abate.

It is submitted that it will be sufficient to dispose of this strange and unsound argument to refer the court to its own decision in *Cortes, Administrator v. Baltimore Insular Line, Inc.*, 287 U. S. 367 (1932), where, in measured language, a great judge said, at page 371:

"If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. *The Iroquois*, 194 U. S. 240. On the other hand, the remedy for the injury ends with his death in the absence of a statute continuing it or giving it to another for the use of wife or kin. *Western Fuel Co. v. Garcia*, 257 U. S. 233, 240; *Lindgren v. United States*, 281 U. S. 38, 47. *Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land.*" (Italics ours.)

The only possible meaning of the above is that there is a distinct maritime rule that personal injury causes of

action die with the person. The rule exists in the maritime law *ex proprio vigore* and independently of its existence in the common law. Indeed, it exists presently in the maritime law although it no longer exists in the common law. The maritime law does not "follow" the common law, nor the changes which have been made in it by State Legislatures.

The Circuit Court did not refer in its opinion to the above quoted passage from the *Cortes* case. At the time that the opinion was rendered, counsel had not called the court's attention to it. The Circuit Court relied on two district court decisions, which are in accord with the rule set forth by the Supreme Court in the *Cortes* case. One was *In Re Statler*, 31 F. (2d) 767, decided in 1929. The other was *Crapo v. Allen*, Fed. Cas. No. 3360, decided in 1849. Petitioners say that these decisions are not in point. In order to show that petitioners are wrong and that the Circuit Court was right, it will be necessary, at the risk of laboring the point, to discuss both decisions at length.

In *In Re Statler*, the causes of action were given by the Merchant Marine Act of 1920, commonly known as the Jones Act. While the suits were pending, and before the matter had been decided, the owner of the vessel died. It was held that the causes of action abated. Judge Knox, who wrote the opinion, held that the abatement took place by reason of the maritime law. He said at page 769:

"When the deceased petitioner elected to resort to a proceeding for the limitation of his liability, if any, the result of such action was to bring the claims that were asserted against him within the jurisdiction of the court, and to subject them to the application of the law that is here administered. The same law, I think, and particularly since the claims are

based on a federal statute, should determine the question as to whether they now stand abated."

The law to which Judge Knox referred was, necessarily, the maritime law since he was sitting in admiralty.

Judge Knox in the course of his opinion (p. 768) had already said that he had had jurisdiction "to impose personal liability upon petitioner, *provided the same had been found and fixed prior to his decease*". (Italics ours.) He went on to say at page 769:

"Nor is the result to be different because of the possibility that one or more of the law actions might have gone to judgment against Statler prior to the date of his demise. The frustration of such possibility is but an incident of a procedure which petitioner was at liberty to adopt, and if, on this occasion, the result has been unfortunate, the mere happening of the occurrence is not accompanied by a remedy."

The petitioner mistakenly asserts that the *Statler* case stands for the proposition that the abatement effected therein depended not on the application of the maritime law, but on an application of the common law. Nothing could be farther from the truth. Judge Knox's remarks with respect to the common law were made after he had already disposed of the case by reason of the maritime rule. After having done so, he went on to point out that the causes of action were based on a federal statute. It followed that the paramount intention of Congress, if it could be ascertained, might require a different result (*Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59) and that was what the judge desired. But the judge could not

find such an intention expressed in the statute. He said at page 769:

“That statute, in terms at least, does not indicate that, aside from the specific exceptions with which it deals, the causes of action which it authorizes shall be measured or characterized by any standard other than that of the common law.”

This is the language which the petitioners have misunderstood. Obviously, the court did not mean that the matter of abatement was intended by Congress to be determined according to the common law, or that admiralty customarily applies the common law to determine abatement. The court was merely trying to save the causes of action, already lost, on some reasonable theory. But nothing could be found to indicate a Congressional intent that a non-common law standard should be applied, and, if one should assume that Congress intended the application of a common law standard, the common law itself was not helpful. Therefore, the court concluded as follows at page 769:

“There being no reasonable theory upon which it can be held that this proceeding should be revived through the entry of the representatives of the petitioner, the motion of claimants directed to that end will be denied.”

Unfortunately, it is also necessary to meet petitioners' challenge by discussing the case of *Crapo v. Allen* at considerable length. That was an action to recover damages on account of cruel treatment of and an assault on a seaman on the high seas. After the cruel treatment and assault had taken place the seaman was put ashore in a foreign port, and after that he died. No claim was made



that the death was caused by the cruel treatment and assault. The defense was that the causes of action abated by reason of the death of the injured seaman. The court agreed, and said at page 763:

“The causes of action set forth are maritime and over them the admiralty has undoubted jurisdiction. So far as they are mere torts, the right of action, by the general maritime law, dies with the person injured.”

The petitioners, in referring to this case on page 22 of their brief, say that it is not in point because the death (*sic*) for which suit was brought occurred upon the high seas and not in the territorial waters of Massachusetts. They say also that there was nothing to show that Massachusetts was the state of the ship's flag.

The petitioners have misread the case. The action was not brought to recover for death but for personal injuries and, whether they occurred on the high seas or in local waters, they gave rise to maritime causes of action.

The case, of *Crapo v. Allen*, therefore, is precisely in point with respect to the existence of a maritime rule of abatement.

Indeed, it is not difficult to show that petitioners' reference to the territorial waters of Massachusetts and the law of the ship's flag have not the slightest relation to the point under consideration.

Plainly, the petitioners have borrowed the ideas, and even the phraseology, of Judge Hutcheson, who dissented in the case at bar. R. 871. However, in doing so they must have misunderstood him, for they misapply his thought.

Judge Hutcheson was considerably impressed by the case of *Crapo v. Allen*. He referred to its holding with re-

spect to the maritime law of abatement as merely a "general statement", with which he disagreed. R. 871. However, his reference to the territorial waters of Massachusetts and the ship's flag concerned an entirely different matter. The matter to which the dissenting judge referred was that part of the opinion in *Crapo v. Allen* which denied the applicability of the local law of Massachusetts in determining whether the action should abate or survive. In dealing with this subject he said that *Crapo v. Allen* was correctly decided on its facts because the tort had not occurred in Massachusetts waters and there was no proof that it had occurred on a Massachusetts vessel.

However, the dissenting judge was incorrect in saying that there was no such proof. It would have been more accurate to say that the opinion does not refer to such proof. However, the opinion does show that the libellant asserted that Massachusetts law was the local law, that the court dealt with the case as if it were, and that it held that the maritime law of abatement was paramount.

On page 22 of their brief petitioners seek to give the impression that the judge who decided *Crapo v. Allen* indicated in a later case that *Crapo v. Allen* had been wrongly decided. Nothing could be further from the truth. However, in order to support their position they quote a passage from *Steamboat Company v. Chase*, 83 U. S. 522, in which Mr. Justice Clifford said at page 532:

"Judge Sprague also applied the same rule in the case of *Crapo v. Allen* (1 Sprague, 184), but in a later case (*Cutting v. Seabury*, 1 Sprague, 522) he left the question open, with the remark that it cannot be regarded as settled law that an action cannot be maintained in such a case."

In order to understand Mr. Justice Clifford's meaning one must know that *Cutting v. Seabury* was an action to recover for the death of a human being. It was not an action to recover for personal injuries. On the other hand, as we have already seen, *Crapo v. Allen* was such an action.

The purport of Mr. Justice Clifford's remarks, therefore, is that although Judge Sprague had applied the rule of abatement to causes of action for personal injury he was of the opinion that whether admiralty gave a non-statutory cause of action for death was an open question.

That, indeed, was the actual position of Judge Sprague, and nothing will serve better to show that this is so than a reading of *Cutting v. Seabury*. It is plain that Judge Sprague saw no inconsistency, as there was none, between a maritime rule of abatement of causes of action for personal injury, and the existence of a maritime cause of action for death. In this respect Judge Sprague's remarks in *Cutting v. Seabury* were symptomatic of a desire shared by many admiralty judges that the maritime law, unlike the common law, should give a cause of action, independently of statute, for death. But such hopes were ended by the decision of the Supreme Court in *The Harrisburg*, 119 U. S. 199.

It is *The Harrisburg* on which the petitioners rely principally. It is necessary only to analyze that case in order to show that petitioners' interpretation of it is incorrect. By so doing their entire argument falls to the ground.

The question which the court had for decision in *The Harrisburg* was not whether, under the maritime law, actions for personal injury *in personam* abate on the death of either party. As stated by the court itself, the question was as follows, page 204:

“1. Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an act of Congress, or a statute of a State, giving a right of action therefor?”

The first conclusion at which the court arrived was, in its own words, as follows, page 205:

“In view, then, of the fact that in England, the source of our system of law, and from a very early period one of the principal maritime nations of the world, no suit in admiralty can be maintained for the redress of such a wrong, we proceed to inquire whether, under the general maritime law as administered in the courts of the United States, a contrary rule has been or ought to be established.”

The court then proceeded to analyze the decisions of American courts with respect to the existence in admiralty of a non-statutory cause of action for death. Incidentally, it noted the decisions of Judge Sprague in *Cutting v. Seabury* and *Crapo v. Allen*. After showing that Judge Sprague had left open in *Cutting v. Seabury* the matter of the existence of a non-statutory cause of action for death, it pointed out, at page 206, that “The same eminent judge had, however, held as early as 1849 in *Crapo v. Allen*, 1 Sprague, 185, that rights of action in admiralty for mere personal torts did not survive the death of the person injured.”

After reviewing the American authorities and showing that they were not in accord, the court dealt with the matter on principle. It pointed out, at page 212, that the laws of Scotland and France gave a cause of action for death.

It had already shown that neither the common law of England nor its maritime law gave such a cause of action. It pointed out further that the civil law was in doubt. Then, it used the words to which the petitioners mistakenly point as supporting their position. They are as follows, page 213:

“But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. It is not mentioned in the laws of Oleron, or Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx.; nor in the Marine Ordinance of Louis XIV, 2 Pet. Adm. Dec. Appx.; and the understanding of the leading text writers in this country has been that no such action will lie in the absence of a statute, giving a remedy at law for the wrong. Benedict Adm., 2d. ed., §309; 2 Parsons’ Ship. & Adm. 350; Henry, Adm. Jur. 74. The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to ‘natural equity and the general principles of law.’ Since, however, it is now established in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particu-



lar under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

The petitioners say that this means that in the maritime law of the United States there is nothing which touches on the matter of abatement of causes of action *in personam* for personal injuries. However, what the Supreme Court meant was, obviously, that, in the so-called general and historical maritime law, the principles of which our maritime law has adopted only to the extent our courts have seen fit to do so, (*The Lottawanna*, 88 U. S. 558) there is nothing touching on a non-statutory cause of action for the death of a human being.

The Court was not, in the passage to which petitioners refer, declaring the maritime law of the United States. It was describing the content of one of the sources of the maritime law of the United States. That this is so is shown by its reference to volumes written before the United States was in existence. In so doing the court was not concerned with and did not refer to what the ancient law provided respecting abatement of causes of action for personal injury.

All of the court's remarks with respect to the ancient sources of the law were made with the purpose of throwing light on what the American maritime law was or should be with respect to the existence of a non-statutory cause of action for death. That was the subject of ultimate inquiry.

When the court finally answered the question with which it was concerned, it held merely that, since there was nothing in the ancient sources of the law which "touched upon" a cause of action for the death of a human being, there was nothing which required the court to create such a cause of

action in the maritime law and, by so doing, to produce an unseemly variance between the two legal systems.

As the court pointed out, although the jurisprudence of some countries gives a cause of action for death, no country gives one for deaths on the water and withholds it for deaths on land, or vice versa. Accordingly, it was thought that such a variance was not desirable in our laws.

This was not, as the petitioners argue, a declaration that the maritime law is under the necessity of slavishly following common law principles. It was, indeed, a declaration that the maritime law, for all its independence, and equitable notions, would not be permitted to create a variance regarding such an important matter between its provisions and the provisions of the common law.

The idea that the maritime law followed the common law was the farthest from the court's thought. What the court was concerned about was whether the maritime law would be permitted to lead the procession toward a desirable result, or must, like the common law, await legislative change.

So understood, *The Harrisburg* and other decisions cited by the petitioners have no bearing on the point decided below. Reference is made to *The Corsair*, 145 U. S. 335, *Western Fuel Company v. Garcia*, 257 U. S. 233. Both of these cases were cases involving causes of action for death. They were not concerned with the abatement of maritime causes of action for personal injury. Both of them recognized the holding in *The Harrisburg* to the effect that there was no maritime cause of action for the death of a human being, but neither case asserted that even that was due to the application of common law principles. The underlying thought behind both decisions was that the rule of admi-

rality was the same as the rule of the common law, but the common law was no more applicable in the maritime system than the maritime rule was applicable in the common law system.

Indeed, it was by reason of the fact that there was nothing in the maritime law which gave a cause of action for death that the Supreme Court, in the case of *The Hamilton*, 207 U. S. 398, found it possible to permit the enforcement in admiralty of a cause of action created by a state statute. As was said in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, at page 166:

"In *The Hamilton*, 207 U. S. 398, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that State which permitted recovery by an ordinary action for fatal injuries, and the power of a state to *supplement* the maritime law *to that extent* was recognized." (Italics ours.)

On the other hand, in *Western Fuel Company v. Garcia*, 257 U. S. 233, at page 241, the Supreme Court said, with regard to its holdings in previous cases:

"And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted."

Necessarily, the meaning of this is that the maritime law is a body of law which does not depend on the application of common law principles for its existence. On the contrary, common law courts take the maritime law from the decisions of maritime courts.

At the same time admiralty judges, in deciding on what the maritime law is, may look to the common law as well as to the civil law in order to find an appropriate maritime rule. That is what this court did in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52. But there is nothing in that case to support the statement of petitioners on page 19 of their brief that "common law principles were applied." The *Imbrovek* case is a foundation stone of the doctrine that the maritime law is an independent body of law.

The controversy which raged many years ago with respect to the power of state legislatures to change the maritime law has long since been settled. While the controversy raged there were two opposed views. One took the position that the maritime law was not a *corpus juris* and, so far as concerned events happening in territorial waters, was no more than a reflection of the common law of the abutting land. The opposed position was that the maritime law was a *corpus juris*, which the Constitution required to be kept uniform, was not a mere reflection of the varying common law systems of the various states and was not subject to change by state enactment except in a special case. This court resolved the controversy by choosing the latter position.

*Southern Pacific Co. v. Jensen*, 244 U. S. 205;  
*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372;  
*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149;  
*Western Fuel Co. v. Garcia*, 257 U. S. 233;  
*Great Lakes Dredge & Dock Co. v. Kierejewski*,  
 261 U. S. 479;  
*Robins Dry Dock v. Dahl*, 266 U. S. 449.

It should be noted, therefore, that what the petitioners have done in order to support their claim that the maritime law is a mere reflection of the common law is to quote from those opinions which took the other side of the controversy many years ago. We refer to petitioners' quotations from Mr. Justice Holmes' remarks in *The Hamilton*, from Judge Brown's remarks in *The City of Norwalk*, 55 Fed. 98 and from the court's opinion in *Buttner v. Adams*, 236 Fed. 105. Petitioner's Brief, pages 17, 20, 26.

In the light of the foregoing it will be realized that the petitioners do not seek a review of a matter which was decided by a Circuit Court contrary to the decisions of this court. On the contrary, what the petitioners seek is to have this court turn back the clock, and to resurrect the bones of a dead controversy.

A word needs to be said concerning the Death on the High Seas Act of March 30, 1920, 46 U. S. C. §761-768. The petitioners, in referring to this act, say that it "does not attempt to affect State statutes either 'giving or regulating' (as by providing for survival of) actions for personal injuries resulting in death upon navigable waters within the boundaries of a State." Petitioner's Brief, page 21.

This is a crude distortion of the provisions of the Death on the High Seas Act. What that act says in Section 7 is as follows:

"The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."

The exception was not of actions for personal injuries resulting in death but of actions or remedies for death.



There is a vital distinction between provisions giving or regulating a cause of action or remedy for death and provisions for the survival of a cause of action for personal injuries. The effort to hide this difference by misquoting the terms of a statute is significant.

Perhaps the significance of this will be clearer when it is pointed out that other provisions of the Death on the High Seas Act lead inevitably to the conclusion that Congress has occupied the field so far as concerns the survival of actions for personal injury both on the high seas and in navigable waters within the limits of a state. This is by reason of the following:

In this statute Congress legislated not only with respect to actions for death but also with respect to actions for personal injury, and not only with respect to the high seas but also with respect to those navigable waters of the United States which are within the territorial limits of a state.

Congress first created a new cause of action for death occurring on the high seas. At the same time, it permitted the continuance of state death acts "within the territorial limits of any state." 46 U. S. C. 767.

With regard to personal injuries, Congress provided that if a person were injured by wrongful act on the high seas, and should thereafter sue in Admiralty to recover damages for the personal injuries, and should then die as a result of the injuries, the action already brought should thereafter continue in Admiralty as a suit to recover for death. 46 U. S. C. 765. The only damages recoverable were those suffered by the next of kin.

Thus, Congress had before it the matter of what should be done in case a person with a cause of action for personal injuries should die thereafter. But, it made only one change

in the law as it had been known theretofore. That change was with respect to those cases in which an action had already been begun in Admiralty to recover damages. With regard to such a case it did not provide that the cause of action for personal injuries should survive, and that the action should be revived. On the contrary, it provided that it should change into an action to recover for death. Congress did not transfer to the next of kin the damages for personal injuries to which the deceased might have been entitled. That cause of action abated. Instead, it gave the next of kin a right to recover only the damages which the next of kin themselves had suffered by reason of the death.

Congress had an option to provide that there should be, first, a survival of the cause of action for personal injuries, which would have required a revival of the action, and, second, a death action. By providing that there should be an action for death only, it showed its intent that the existing maritime law should not be disturbed. Not only those who had not begun actions for personal injury, but also those who had done so, were left in the same position as before. Henceforth, as in the past, their causes of action for personal injury should abate on their deaths.

Congress referred specifically to actions for personal injury which should occur on the high seas. With regard to those occurring within the territorial limits of a state, Congress said nothing. Indeed, the only specific action which Congress took with regard to waters within the territorial limits of a state was to preserve the state death acts.

The silence of Congress with respect to the survival statutes of the states is eloquent of Congress's intention that the maritime law with respect to the non-survival of

causes of action for personal injuries occurring on navigable waters within the limits of a state should not be affected by state legislation.

One would find it difficult to believe that Congress intentionally kept in force the Admiralty rule concerning abatement in cases where injury had occurred on the high seas but nevertheless intended that the states should be permitted to change the rule with regard to abatement when the injury should occur within the territorial waters of a state. It is more in line with common sense that Congress intended to have the same rule whether the injury should occur on the high seas or within the territorial waters of a state. Congress would be the last to intentionally produce a lack of uniformity in the maritime law, which, under the Constitution, is required to be uniform.

An analogous situation is found with respect to the Congressional statutes known as the "Employers' Liability Acts." In *St. Louis, Iron Mountain & Southern Railroad Co. v. Hesterly, Administrator*, 228 U. S. 702, the plaintiff sued to recover on account of the death of his intestate which had occurred in 1909. In 1908 Congress had passed the Federal Employers' Liability Act which gave a cause of action for death but which did not provide for the survival of causes of action for personal injury. A recovery of \$2,000 was permitted for the death and a recovery of \$5,000 was permitted for the personal injuries. The latter recovery was based on a statute of the State of Arkansas which provided for the survival of causes of action for personal injury.

The Supreme Court said that Congress's failure in the Employers' Liability Act of 1908 to provide for the survival of a cause of action for personal injuries meant that

it was Congress's intention that such causes of action should not survive and that state laws were powerless to change the situation. Furthermore, the Supreme Court was well aware that in 1910 Congress had amended the Employers' Liability Act to provide that personal injury actions should survive. It was held that the amendment did not apply to the case because the death had occurred in 1909.

Similar applications of the law are to be found in *New York Central Railroad Co. v. Winfield*, 244 U. S. 147, and *Lindgren, Administrator, v. United States, et al.*, 281 U. S. 38.

So, too, Congress, in enacting the Death on the High Seas Act, intended that the settled maritime law providing for the non-survival of causes of action for personal injury should be continued. It granted a new right of action only for death. As to local waters, it preserved only the death acts of the states. It gave general approval to the admiralty rule of non-survival of causes of action for personal injury and gave expression to that approval for causes of action arising on the high seas. Its silence concerning personal injury actions arising on territorial waters shows the same intention in the maritime field as this court said its silence showed in the field of interstate commerce.

## POINT II.

A STATE LAW PROVIDING FOR THE SURVIVAL OF A CAUSE OF ACTION IN PERSONAM FOR PERSONAL INJURIES DOES NOT APPLY TO A MARITIME CAUSE OF ACTION.

The above was the holding of the Circuit Court. There were two reasons which required it. The first was that, since the cause of action was given by the Federal maritime

law, it was for Congress alone to determine when it should abate. This was a necessary result of this court's decision in *Ormsby v. Chase*, 290 U. S. 387.

Without question, state survival acts are inapplicable to rights granted by a Federal statute.

In *Michigan Central Railroad v. Vreeland*, 227 U. S. 59, it was said at page 67:

"The statutes of many of the States expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employe, it does not pass to his representative, notwithstanding state legislation. The question of survival is not one of procedure, 'but one which depends on the substance of the cause of action.' *Schreiber v. Sharpless*, 110 U. S. 76, 80; *Martin v. Baltimore & Ohio R. R. Co.*, 151 U. S. 673."

We are concerned here with a right granted by the Federal maritime law, which depends on the Federal Constitution. By reason of that dependence the Federal maritime law is in the nature of a Federal statute.

As was said in *Schuede v. Zenith Steamship Company*, 216 Fed. 566, at 567 (affirmed 244 U. S. 646):

"We agree with counsel for defendant that the principles of the general maritime law in force in the United States and not the subject of specific enactment by Congress are to be treated as if actually on the statute books. This must be construed to be the effect of section 2, article 3, of the Constitution, extending the power of the federal courts 'to all cases of admiralty and maritime jurisdiction,'



thus practically adopting the general law of admiralty as the law of this country, and such general law in force when the Constitution was adopted and not modified by act of Congress has the same force and is to be treated with the same consideration which must be given to statutes upon the subject. *Murray v. Chicago & Northwestern Railroad Co.* (C. C.), 62 Fed. 24; *The Lottawanna*, 21 Wall 558, 22 L. Ed. 654. A state may not pass any act which abridges or enlarges the responsibilities or duties of maritime law. Rights in admiralty cannot be affected by state enactment. *The Moses Taylor*, 4 Wall 411, 18 L. Ed. 337; *The Hine v. Trevor*, 4 Wall 555, 18 L. Ed. 451; *The Lottawanna*, *supra*; *Butler v. Boston Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314."

Again, the Supreme Court of the United States in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, said at page 160:

"Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. \* \* \* The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true, it is quite impossible to account for a multitude of adjudications by the admiralty courts."

Therefore, on plain jurisdictional grounds the survival of a cause of action granted by the maritime law must depend on the will of Congress alone.. Congress had the subject before it when it passed the Death on the High Seas Act and deliberately refused to change the maritime law as to the survival of personal injury actions.

The second reason given by the Circuit Court for its decision was that the application of a state survival act to extend the normal life span of a maritime cause of action would be in violation of the Constitutional requirement that the maritime law be kept uniform. In other words, such an application of state law would work material prejudice to a characteristic feature of the maritime law or would interfere with its uniformity in its international or interstate relations.

The petitioners' challenge to this ruling is based entirely on the false assumption that there is not a maritime rule which provides for abatement. The petitioners say that the abatement of personal injury causes of action which has been accomplished in admiralty has depended on the application of common law principles only; and petitioners draw from the assumed applicability of common law principles in admiralty the conclusion that state statutes modifying the common law are applicable as well. Stripped of all its adornment, and reduced to its essentials, petitioners' absurd argument is constituted of two principles. The first is that there is not a Federal maritime law. The second is that, therefore, there cannot be any prejudice to its characteristic features or interference with its uniformity.

In Point I it has already been shown that the petitioners are mistaken in asserting that there is not an independent maritime law which provides for the abatement of personal

injury causes of action. It follows from that error that the argument which uses it as a premise is erroneous also.

It is because of this original error that petitioners seem not to be able to understand the difference between state statutes which give an original cause of action for death and state statutes which the petitioners seek to have applied in admiralty in such a way as to extend and modify a right already derived from the maritime law.

Petitioners say correctly that state death acts have been enforced in admiralty. They go on to say that there is no valid distinction between a state death act and a state survival statute. Petitioner's Brief, page 24. The Circuit Court disagreed because there is a vital distinction. R. 866. The distinction lies in this, that a death statute is a *new* right created by the state which admiralty will enforce, as it will enforce many other rights *created* by states, because there is nothing in the maritime law which is opposed thereto. The right given by a state death act is looked upon as supplementing the maritime law and not changing it. As this court said, in *Lindgren v. United States*, 281 U. S. 38, at p. 43:

“In this situation it was held, in the absence of any legislation by Congress, that where a seaman's death resulted from a maritime tort on navigable waters within a State whose statutes gave a right of action on account of death by wrongful act, the admiralty courts could entertain a libel *in personam* for the damages sustained by those to whom such right was given. *Western Fuel Co. v. Garcia*, *supra*, 242; *Great Lakes Co. v. Kierejewski*, 261 U. S. 479, 480. But, as said by the Circuit Court of Appeals, such statutes ‘were not a part of the general maritime law’ and were recognized only because Congress had not legislated on the subject.”

On the other hand, statutes which provide for the survival of causes of action for personal injury change the life span of a cause of action given by some other law. In the case at bar the cause of action was given by the maritime law. To extend the life of such a cause of action beyond the time intended by the jurisdiction which gave it is a serious and unsupportable interference.

Furthermore, when, as here, the maritime cause of action is given to residents of Missouri, is against a resident of Ohio, and arises out of a tort supposedly occurring during and as a result of the operation and navigation of a vessel in the navigable waters of the United States, there is an undoubted constitutional prohibition.

In *Robins Dry Dock Co. v. Dahl*, 266 U. S. 449, this court had before it the case of a ship repair man who was working on a vessel then in navigable waters at Brooklyn, N. Y. He fell into the hold and was injured. He sued his employer, a local shipyard, claiming that his injuries had been caused by negligence. The trial judge charged the jury that they might consider the provisions of the local Labor Law in deciding the question of negligence. This court held that the instruction was erroneous and said, at page 457:

“The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute. *Chelentis v. Luckenbach S. S.*

*Co.*, 247 U. S. 372, 382; *Union Fish Co. v. Erickson*, 248 U. S. 308; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259. They would not have been different if the accident had occurred at San Francisco.

The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court. The error is manifest and material. See *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 511; *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367, 371; *American Railway Express Co. v. Levee*, 263 U. S. 19, 21."

As indicated in the above quotation, there is nothing to the petitioners' complaint which appears on page 33 of their brief that their rights have been diminished because they have been required to present their claim in a limitation of liability proceeding. As the Circuit Court pointed out, their rights would have been the same had they brought an action at common law. If they had done so, the action would have been held abated. R. 368.

*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, at 384;

*Western Fuel Co. v. Garcia*, 257 U. S. 233, at 241.

Indeed, the institution of the limitation proceeding has been of great service to the petitioners. Had they sued at common law they could not have enforced a cause of action *in rem* against the vessel. That cause of action can be enforced only in admiralty because it is based on a lien.



By coming into the limitation proceeding they lost nothing which they would not also have lost at common law, but they gained a chance to hold the vessel *in rem*. Such a cause of action does not abate, and the petitioners may, since they have won on the merits, have satisfaction.

However, if one assumes, as the petitioners do, that there is not an independent maritime rule of abatement of causes of action for personal injury, there is no problem, and there is, indeed, no difference between death statutes and survival statutes. If the rule applied in admiralty to abate personal causes of action is not a maritime rule but a rule of the common law, then, of course, any change in the rule is merely a change of the common law.

Perhaps there is a key which will enable us to reach the source of petitioners' error in a statement on page 24 of the petitioners' brief. There, it is said, \* \* \*, "State statutes applying a remedy where there was none before (as in the instant case) will be recognized and enforced in admiralty."

This is an obvious confusion. An act providing for the survival of a cause of action for personal injury is not remedial. It affects the substance of a cause of action.

*Schreiber v. Sharpless*, 110 U. S. 76, 80;

*Martin v. Baltimore & Ohio R. R. Co.*, 151 U. S. 673.

And, when the cause of action is maritime, application of a state survival law is objectionable both on jurisdictional and constitutional grounds.

Petitioners are so concerned with glossing over the distinction between death acts and survival acts that they have gone to the length of distorting the plain meaning of words.

This appears on pages 25 and 26 of their brief, where an effort is made to draw a favorable conclusion from the opinion of the court in *Western Fuel Company v. Garcia*; 257 U. S. 233.

That case was concerned with an action brought to recover damages for death under a state statute, and this court held that the statute was validly applied to a death occurring on the water because the subject was local in character. The subject to which the court referred was an action for death given by state laws. However, the petitioners have seen fit to amend this court's language and thought by saying that the subject to which the court referred was "personal injuries resulting in death by wrongful act upon state waters." Having so amended the opinion of this court, they proceeded to the conclusion that personal injuries which do not result in death are also local in character.

It seems that petitioners may not realize that actions for death have nothing to do with personal injuries. They say, on page 29 of their brief:

"\* \* \* there could be no wrongful death without personal injury."

However, a death action is a right given to survivors and, as the Circuit Court pointed out, is in the nature of a property action, R. 866. Ordinarily, the damages depend on the financial loss suffered by the survivors. Furthermore, in point of fact death can occur without personal injury, and it was so held by this court in *The Corsair*, 145 U. S. 335, at 348.

To say, as the petitioners do, that a death act provides a remedy for a personal injury shows that the petitioners' terminology is capable of great variation in meaning. When

such a terminology is applied to the construction of one of this court's decisions the result is inevitable.

The petitioners cite on pages 29 to 32 of their brief several cases which they say support their claim that the survival acts of states have been enforced in admiralty courts. These are *In Re Long Island etc. Transportation Co.*, 5 F. 599; *Steamboat Company v. Chase*, 83 U. S. 522; *The Corsair*, 145 U. S. 335; *The Albert Dumois*, 177 U. S. 240; *Quinette v. Bissop, et al.*, 136 Fed. 825.

All of these cases were cited in the Circuit Court. In not a single one of them was a state survival act enforced in admiralty. In each of them the action was to recover for death. In some of them the statutes involved did not even provide for survival.

In *In Re Long Island, etc. Transportation Co.*, 5 F. 599, the particular death statute (New York) is not set forth in the opinion, but the opinion says that the claimants were seeking damages for death. 5 F. 599, at 607. The claimants could not have been seeking damages for personal injury, for, under New York law, an action for personal injuries did not survive in 1881.

In *Steamboat Company v. Chase* the particular death statute (Rhode Island) is set forth at 83 U. S., 522. It does not provide for the survival of a cause of action for personal injuries. It does provide a cause of action for damages caused to next of kin by reason of another's death.

In *The Corsair*, 145 U. S. 335, the action was brought to recover solely for death, and was dismissed because the action had been brought *in rem*, the statute not giving a lien. Although the Louisiana Death Act provided both for a cause of action for death and for the survival of actions for personal injuries, the latter was not involved in the

case. Indeed, had the claim been for personal injuries the action would not have been dismissed because under the maritime law a cause of action for personal injuries survives in *rem*. This is because the lien attaches during the lifetime of the injured person.

In *The Albert Dumois*, 177 U. S. 240, the claim was brought to recover damages for death under the Louisiana statute. This appears on page 257 of the opinion. The survival of a cause of action for personal injuries was not involved.

Furthermore, the Massachusetts survival statute, which the petitioners say was involved in this case, was not even mentioned. Indeed, its utter irrelevance is to be assumed in view of the fact that the case involved a death as a result of a collision between two vessels in the Mississippi River below New Orleans.

*Quinette v. Bisso*, 136 F. 825, was a case in which there was a claim for damages under that portion of the Louisiana statute which provided for a cause of action for death. That part of the statute which deals with the survival of a personal injury action was not involved. Indeed, the death in that case was by drowning and because of that there could not have been a cause of action for personal injuries.

*The Corsair*, 145 U. S. 335, at 348.

There is not one decided case which holds that a state survival statute may be applied to extend a maritime cause of action. On the other hand, the case of *Crapo v. Allen*, Fed. Cas. No. 3360, holds that it cannot. Furthermore, the

case of *The Lafayette*, 269 F. 917 decided in the Second Circuit, is persuasive authority to the same effect. There, the action was in admiralty, but in *rem*. The claimants died after suit had been begun. A New York statute provided that actions for personal injury should abate on the death of the *tort feasor*, and it was argued that the New York statute was controlling. In other words, it was maintained that, even though the action was founded on a lien, it was still an action to recover for personal injuries, and that, accordingly, the death of the *tort feasor* produced an abatement by reason of the local law. But the Circuit Court held that it did not, and said at p. 927:

"Our attention has been called to a number of New York decisions that a claim for personal injuries does not survive the death of the injured party; and we are also informed that in pursuance of the New York statutes causes of action for personal injuries abate upon the death of the parties. *But what has been already said must have made it clear that these actions, arising out of a maritime tort and giving rise to a maritime lien, are not subject to the rules of the common law courts or to the statutes of the state of New York. We are dealing with a maritime tort, and the rights of the parties are to be determined upon the principles of the maritime law. The lien which is claimed is not one created by any state. The damages which are sought are not damages for causing death.*" (Italics ours.)

The petitioners do not mention this case.

The decision of the court below was correct. It was not only in accord with previous decisions of courts of equiva-



lent jurisdiction, but it was required by principles derived from decisions of this court as well. The petitioners have brought forward nothing which merits review, and their petition should be denied.

Respectfully submitted,

RAYMOND PARMER,  
VERNON SIMS JONES,  
Proctors for Respondent,  
New York City.

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# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST and ANNE ELISE GRUNER,  
*Petitioners,*

v.

ALMA CHAMBERS, as Executrix of the Estate of  
Henry C. Yeiser, Jr., as owner of the American Yacht,  
*Friendship II,*

*Respondent.*

## BRIEF FOR RESPONDENT.

RAYMOND PARMER,  
VERNON S. JONES,  
New York City,  
*Proctors for Respondent.*

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# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST and ANNE

ELISE GRUNER,

Petitioners,

v.

ALMA CHAMBERS, as Executrix of the  
Estate of Henry C. Yeiser, Jr., as  
owner of the American Yacht,  
*Friendship II*,

Respondent.

## BRIEF FOR RESPONDENT.

In this case there are two important questions. One is whether a maritime cause of action *in personam*, in addition to a cause of action *in rem*, survives against the executrix of a deceased tortfeasor. The other is whether there ever was a cause of action to begin with.

In the brief which the respondent submitted in opposition to certiorari respondent said that, in view of the power of the court as set forth in *Langnes v. Green*, 282 U. S. 531, 535-539, respondent would be entitled, should certiorari be granted, "to urge the court to go beyond the narrow question of how much damages the petitioners may have and to decide whether they should have any at all." Brief, p. 4. Particular reference was made to the two issues of law



underlying this question, which were decided against the respondent in the courts below.

When certiorari was granted in this case the Supreme Court did not say that the only question which would be considered was whether a maritime cause of action *in personam* survives. Therefore, respondent now urges the court to exercise its full power and to decide, first, whether there was any liability at all, and then, if it should decide that there was liability, whether that liability survived against the executor of the tortfeasor or was limited to the vessel and its value.

#### POINT I.

THE DECEASED SHIP OWNER WAS NOT LIABLE AS A MATTER OF LAW.

Stripped to its essentials, the petitioners' case was, first, that, while they were on the vessel of the deceased ship owner, they were his social guests, second, that they were injuriously affected by motor fumes which came from holes in the vessel's exhaust pipe, third that the deceased host owed them a duty, and, fourth, that he did not perform it.

Obviously, a failure in respect of any one of these parts of the petitioners' case should have been fatal.

Respondent's contention, with regard to these matters, is as follows: First, the petitioners proved that they were social guests of the ship owner. Second, there was not any proof at all that the petitioners were affected by motor fumes. Third, the deceased ship owner did owe the petitioners a duty, but it was not the duty which the courts below said he owed. Fourth, there was not any proof of a failure on his part to perform either the duty which he actually had or the duty which the courts below said he had.

With regard to the matter of motor fumes and their effect on the petitioners, the District Court found as follows (R. 830):

"Shortly before the boat reached Miami the claimants were discovered in an unconscious condition. The door to the bathroom was open but the windows in their stateroom and in the private bath opening into the stateroom were closed. While they were asleep in the stateroom which had been assigned to them, they were overcome, rendered unconscious and injuriously affected by carbon monoxide gas which had been permitted to escape from holes in the exhaust pipes into the stateroom."

The Circuit Court of Appeals, with regard to these findings, said (R. 864):

"The District Judge found that carbon monoxide gas in the form of exhaust fumes which were escaping from the pipes collected in the bilge and, passing through the vents into the stateroom, overcame the appellees while they were asleep and were the proximate cause of the injuries complained of. These findings were based on the oral testimony of the witnesses taken in open court. The District Judge had the opportunity which we do not have of facing each witness and of judging at first hand the weight of what he had to say. Every finding of fact which the judge made is supported by evidence. Where there is a conflict of evidence we are not in position to say that the appellees' evidence is unworthy of belief."

In view of the remarks of the Circuit Court with respect to the limitations on its power to weigh testimony it is necessary to say that respondent did not in that court, and does not in this, ask that the evidence be weighed. The re-

spondent's contention in the Circuit Court, as it is here, was that there was not any evidence at all to support the essential finding of fact that the petitioners were affected by motor fumes, and that the Circuit was wrong in holding otherwise. This raises a legal question.

**A. THERE WAS NOT ANY PROOF THAT PETITIONERS WERE  
AFFECTED BY MOTOR FUMES.**

No one testified at the trial that he saw or smelled any motor fumes in the room in which the petitioners were found unconscious or at any place on the vessel. The petitioners did not so testify. They did not testify at all. They were not even present at the trial. Neither did any member of the crew, and all of them were called, say that he saw or smelled motor fumes in the room. Neither did Mr. McKay, who was also a guest and was the only witness called on behalf of the petitioners to prove what happened on the vessel. Indeed, Mr. McKay, who discovered the petitioners unconscious in their room, where they had been sleeping with all windows closed and the door shut, opened the door and remained in the room for two or three minutes before he opened the windows. During all of this time he did not notice any unusual or peculiar odor. Specifically, he did not notice any smoke or exhaust fumes, R. 116, 118, 64, 65.

During all of this time the vessel's engines were operating and, if motor fumes had been entering the cabin previous to Mr. McKay's entry therein, there was no reason why they should not have continued doing so while he was there. R. 621, 691, 692. Furthermore, if motor fumes had been entering the room before Mr. McKay's coming there, there is no reason why they should not have collected there in volume. With the windows closed and the door to the

alleyway closed there was no way in which they could escape. Indeed, the petitioners' claim that they were made unconscious by motor fumes necessarily rests on a claim that motor fumes did collect in the room in such appreciable volume as to enable one of their component parts, carbon monoxide, to cause unconsciousness. Yet Mr. McKay said that he did not see nor smell any motor fumes at all. Moreover, McKay was not a casual observer. He and Yeiser sniffed the air in the room. McKay thought it lacking in oxygen. But neither he nor Yeiser saw nor smelled anything which was foreign to normal atmosphere. R. 104, 116, 117.

In this day and age one does not have to describe the odor and appearance of motor fumes. Most persons have been close enough to the exhaust of an automobile to know that motor fumes are not only objectionable, but, in volume, repelling.

In view of the above, therefore, the finding of the District Court was and is repugnant to common sense.

No physician made any tests by reason of which he was able to say or did say that petitioners had suffered carbon monoxide gas poisoning. No physician said that, solely as a result of the symptoms which he found on examination, he was of the opinion that either of the petitioners had suffered from carbon monoxide gas poisoning.

With regard to one of the petitioners, Miss Gruner, no physician said anything at all with respect to the cause or the nature of her condition. She seems to have been forgotten. With respect to Mrs. Just, the other petitioner, each physician who testified, and there were three, was of the opinion that if, as they had been told, she had been exposed to motor fumes, then the condition in which they found her on examination could have been caused by such exposure. R. 354, 263, 229, 231-233, 184, 225, 719. One of



them, believing what he had been told, was of opinion that Mrs. Just had been affected by carbon monoxide gas. R. 184.

But two of the three physicians who examined Mrs. Just, and testified at the trial, were not satisfied that she had been affected by carbon monoxide gas. Dr. Howell, who was the sole physician in charge during the hours she remained on the vessel after it docked, was suspicious of the history of exposure to motor fumes. He suspected alcoholism and treated the case accordingly when he brought her to a hospital. R. 263, 264, 265. However, he recorded the case in the hospital records not in terms of alcoholism but in terms of the history of exposure to motor fumes, which he had received. Exhibits 9A, 9L. He did this in order to protect Mrs. Just's good name. R. 269. Another physician, Dr. Harris, specifically recorded in the hospital record that a diagnosis of carbon monoxide poisoning was likely "in view of the history" Exhibit 9L. On the trial he declined to say that the diagnosis had been confirmed. He preferred to say that carbon monoxide was "suspected." R. 719. And he would go no further even though he had been given a history of exposure to motor fumes.

Obviously, the District Court could not draw from the testimony of any of the physicians an inference that the petitioners had been affected by motor fumes or carbon monoxide gas. The physicians, themselves, did not express an opinion which was independent of the history which was given to them. Their opinion stands or falls on the truth of that history, and if, as a fact, the petitioners were not exposed to motor fumes, the opinions of the physicians could not have been of assistance to the court.

The theory that the petitioners had been exposed to motor fumes originated in the minds of Yeiser, the deceased ship owner, and Mr. McKay, before the vessel reached the



dock. They were trying to explain to each other the petitioners' unconsciousness and concluded that it was caused by carbon monoxide gas. R. 66-69. Yeiser not only expressed that opinion to McKay but later on he so informed Dr. Howell, who was called to treat the petitioners. R. 70. The physician acted accordingly. R. 300, 304, 354. And Dr. Howell passed this history on to other physicians. R. 190, 718.

But the District Court could not have drawn from Yeiser's expression of opinion an inference as to the fact. The testimony with respect to what Yeiser said was not received for such a purpose. When offered as an admission objection was made and the court said that it thought "an admission against interest ought to be on facts and not an opinion. R. 68."

Accordingly, when counsel for the petitioners reframed his question to ask whether the ship owner made "any expression at this time as a part of what was going on there as to what was the cause of this illness" counsel for respondent said that there was no objection. The question as reframed was clearly directed to bringing out only the surrounding circumstances. R. 68.

And it is precisely in showing the surrounding circumstances that Yeiser's expression of opinion was of value. It showed the origin of the theory, never supported by any evidence at all, that the petitioners had been exposed to motor fumes.

It may well be wondered how Yeiser and McKay could have formed an opinion that the petitioners had been exposed to motor fumes if, when they sniffed the atmosphere of the room, they neither saw nor smelled any. So far as McKay is concerned, the explanation is clear from his testimony on the stand. He was smelling for pure carbon monoxide gas, which he understood to be and which is

a colorless and odorless substance. R. 87, 115. It did not occur to him, until he was confronted with the fact on the trial, that the carbon monoxide gas for which he had been sniffing could only be a component of a larger mass of motor fumes. R. 116. If they had been present he could not have missed them.

McKay, therefore, or anyone else who was trying to discover an odorless and colorless gas, might be excused for believing that it was present even though he could not detect it. And, so believing, such a person might so inform a physician. On the undisputed evidence, that is exactly what happened.

The District Court, therefore, had a case where all that appeared was that two women were found unconscious in their beds. There were holes in an exhaust pipe which passed through the bilge beneath their room. There was evidence that motor fumes, which might escape from the hole, could, by reason of the ship's construction, enter the room. But there was nothing to show that they did. Because the court was not satisfied that the unconsciousness was due to alcoholism, and no other explanation of it was given,\* the court, as the opinion shows, found that motor fumes did enter the room. R. 819. The court also relied on the fact that on board the ship both petitioners and, in the hospital, one of them, was treated as if they were suffering from gas poisoning. R. 819. That, indeed, was no reason at all. If there was error in so doing, the District Court merely perpetuated that error.

The petitioners when found in their beds and thereafter did not have the characteristic appearance of persons who have suffered unconsciousness from carbon monoxide poisoning. The skin of such persons is red. Petitioners

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\* The ladies never gave any testimony.

were pale and their lips were blue (R. 815, 816, 359, 255, 253, 184).

The burden was on the petitioners to prove the cause of their condition. If alcohol was not the cause, as the court found, it did not follow that motor fumes were. In view of the fact that there were no motor fumes detected in the room by those who could not have failed to detect them had they been there, the conclusion is inevitable that the unconsciousness must have been caused by something else. What that was it was for the petitioners to show. They did not help matters by not attending the trial.

**B. THE DECEASED SHIP OWNER HAD A DUTY TO PETITIONERS  
BUT IT WAS NOT THE DUTY WHICH THE COURTS  
BELOW IMPOSED ON HIM.**

Both courts have held that Yeiser had a duty to know and realize that the petitioners were subject to a danger of being exposed to the carbon monoxide gas by which, according to the finding, they were affected. R. 821, 865. If the duty which a maritime host owes a social guest is the same as that which an occupier of premises owes a business visitor at common law, the courts below were correct. On the other hand, if the duty which a maritime host owes a social guest is the equivalent of that which a host owes a guest at common law, both courts were wrong.

An occupier of premises at common law owes a business visitor a duty not only to remedy defects in premises but to discover and to warn the visitor against them as well. A host, at common law, does not owe his social guest a duty to discover defects in the premises. His duty extends only insofar as he has actual knowledge. He is not bound to know or, what is the same thing, discover. But, if he does know of a danger, he must warn his guest.

American Law Institute's Restatement of the Law of Torts, Volume 2, §§ 331, 332, 341 and 342; *Higgins v. Mason*, 255 N. Y. 104; *Galbraith v. Busch*, 267 N. Y. 230; *O'Shea v. Lavoy*, 175 Wis. 456; *Sommerfield v. Flury*, 198 Wis. 163; *Petteys v. Leith*, 62 So. Dak. 149; *Marple v. Haddad*, 103 W. Va. 508; *Howe v. Little*, 182 Ark. 1083; *Shrigley v. Pierson*, 189 Ark. 386; *Coppedge v. Blackburn*, 15 Tenn. App. 587; *Boggs v. Plybon*, 157 Va. 30; *Liggett & Meyers Tobacco Co. v. DeParcq*, 66 F. (2d) 678; *Ingerick v. Mess*, 63 F. (2d) 233; *Hewlett v. Schadel*, 68 F. (2d) 502.

The maritime law appears to be the equivalent of the common law with respect to the duty owed by a host to a social guest. It was so recognized in the *Blue Moon III*, 60 F. (2d) 653, by the United States District Court for the Western District of New York sitting in Admiralty.

C. THERE WAS NO PROOF OF A FAILURE TO PERFORM EITHER THE DUTY WHICH THE DECEASED SHIP OWNER HAD OR THE DUTY WHICH THE COURTS BELOW IMPOSED ON HIM.

It is fundamental that if a person knows of a danger, he has a duty to give a warning to his business visitors or his social guests. The duty of knowing which an occupier of premises owes to a business visitor carries with it a duty to warn. The duty in that case is to know and warn.

Both courts below said that Yeiser owed a duty to the petitioners to warn them of the danger to which they were subjected, and that there was a failure on his part to warn them. Under familiar principles this finding was vital, for if the petitioners knew as much about the danger as Yeiser knew, or was supposed to know, and chose to remain on board the vessel, they could not recover.

Moreover the district court held properly that the burden was on the petitioners to prove that Yeiser failed to warn them, or that they were not warned by somebody.



However, the manner in which the courts arrived at the conclusion that Yeiser failed to warn the petitioners, or that the petitioners were not warned by someone else, or in some other way, is beyond discovery. Neither of the petitioners testified. Yeiser was dead. No-one else could or did give competent evidence on the point. There is a total failure of proof that the petitioners were not warned about the room.

This failure of proof is not technical merely. No-one can tell just how much the petitioners knew or did not know unless they hear it from their own lips. It is idle to presume that they would not have taken a risk had they known what it was. The law of torts is founded on injuries produced by risks taken both by *tortfeasors* and injured persons. Unless we are to abandon the normal requirements that each person who claims that another is responsible to him for personal injuries shall prove the essentials of his case, it follows that, when the petitioners failed to prove that they had not been warned, which it was their burden to prove, the decree should have gone against them for that reason alone.

It should not be forgotten that the case below involved the estate of a dead man. Ordinarily, the law protects executors by requiring strict proof. Here, not even the ordinary requirements were observed.

Furthermore, there was no proof that Yeiser knew that there were holes in the pipe at the time that the petitioners were on board the vessel. It was not contended below, and it was not found, that he did have such knowledge. But both courts have held that he should have known it. R. 821, 865.

Constructive knowledge is not the same as actual knowledge, and, where a rule of law stipulates that the knowledge must be actual, it is erroneous to substitute for such knowl-



edge constructive knowledge. Therein lies an error but for which the decree below necessarily would have been different.

In *Higgins v. Mason*, 255 N. Y. 104, a guest of the owner was killed while riding with the owner in the latter's automobile. The death was caused by a mechanical defect in the car which caused it to turn over while being operated. The owner had no knowledge of the existence of the mechanical defect. Although he knew there was something wrong with the car he did not know what it was. It was held that there was no liability. The court said, page 110:

"Under the authorities, the defendant host, George Mason, was not liable for the death of his guest, Robert Higgins, because of a mechanical defect in his car, although Mason, by inspection, might have discovered the fault, since Higgins, in accepting the invitation to ride, must have taken the car as he found it and no duty of inspection rested upon Mason. Mason would be liable only if he *knew* of the dangerous condition; *realized* that it involved an unreasonable risk; *believed* that the guests would not discover the condition or realize the risk; and failed to warn them of the condition and the risk involved. Does the record show that these conditions, upon which liability depends, have been complied with?"

At page 111, it said:

"Even if Mason knew that something was wrong with the car, that it was 'lgy' on hills, that it did not steer well, this was far from being realization of the fact that a serious mechanical defect, making further travel dangerous, was involved. Mason's own conduct in exposing his wife and himself to the peril of traveling farther in the car indicates that he was not conscious of the peril. If Mason thought

the car safe for himself he could not have realized that it was unsafe for his guests."

This case states the common law rule explicitly. Whether the maritime rule is the same is for this court, in the last instance, to decide. If it is the same, the decree below is wrong because on the facts the above cited case is not distinguishable from the case at bar.

If, on the other hand, it be assumed that the courts below were correct in holding that the deceased host had a duty to discover the defective condition of his premises, there was not any proof to support the court's conclusion that he was negligent in not discovering it. As may be seen on examination, the court's conclusion in this respect was derived from false premises and false reasoning.

The Circuit Court of Appeals assumed and said that Yeiser had been told at the time he purchased the vessel that the port exhaust pipe should be renewed. R. 865. This was not true. The evidence and the findings of fact show that, five weeks before he purchased the vessel, he was informed, not only that the pipe should be renewed but "among other things," that it might be repaired, R. 827, 730. The duty was not on him, while the vessel was still owned by someone else, either to renew or repair the pipe, and there is nothing in the evidence or the findings of fact to show that the exhaust pipe was not satisfactorily and safely repaired at the time that Yeiser became the owner. It might be inferred that, knowing that repairs were necessary, he would insist that they be made before he took title.

Yeiser became the owner in May 1934. R. 827. The petitioners were on the vessel on March 1, 1936. There was no evidence and no finding below that when Yeiser bought the vessel the exhaust pipes were defective. There was no finding below that there were holes or defects in the exhaust

pipe at any time during the period of Yeiser's ownership, except at the time that the petitioners were on board and "for a long time prior thereto." R. 831. And there was no evidence as to how long they had existed "prior thereto." Moreover, the District Court did not say how long they had existed, because of this absence of evidence.

And yet both courts have held that Yeiser could and should have known in September 1935 of a defect in the pipe which the courts themselves, after hearing all the evidence, could not and did not say existed in the pipe at that time or any other time in particular before March 1, 1936.

On the one hand, it was admitted that Yeiser knew that motor fumes could and had entered the interior of the vessel on other occasions, the last time being in September 1935 when they affected one of his sons. Both courts took this admission and coupled it with what Yeiser had been told with respect to the condition of the exhaust pipe when the former owner had it. They concluded that the two circumstances were enough to make him suspect the exhaust pipe rather than the natural phenomenon of gases being blown occasionally into the vessel after being exhausted in the normal manner at the stern. R. 820, 821, 865. From this they found that he was required to make an inspection thorough enough to discover a defect in the pipe if one was there. Therefore, he was negligent in attributing the presence of motor fumes to natural causes.

The vice of this reasoning is that it assumes that the pipe was defective in September 1935 and then blames Yeiser for not discovering it at that time. The truth is that there was no evidence and the District Court did not find that the pipe was defective in September 1935. Unless it was defective at that time Yeiser could not have discovered a defect by the most thorough inspection. And it was wrong to hold that he should have discovered a defect, and

that the inspection which he did make was inadequate, when the District Court was unable to find and did not find that a defect existed.

All that the District Court could and did find with respect to the condition of the pipe as of September 1935 is that there was a possibility of a defect. R. 820, 828. Obviously, it is absurd to hold a person negligent for not discovering a defect which was only possible but which did not actually exist.

Furthermore, the coupling of what Yeiser had been told before he bought the vessel with his experience of September, 1935 led the District Court, if not the Circuit Court, into an even more glaring error. It was said that he had actual knowledge that the stateroom *per se* was a dangerous place because motor fumes had entered it and that he was guilty of active negligence in assigning this stateroom to the petitioners. R. 829. From this it was concluded that he was responsible for what happened to the petitioners while they were in it. R. 831. Again, this assumes, without warrant, that there was a hole in the pipe in 1935. True, Yeiser knew that the room could become dangerous if motor fumes entered it. True, he knew that motor fumes could enter it. But it is false reasoning to hold that he was negligent in not acting with reference to holes in an exhaust pipe which, for all that was found below, did not exist. In the light of what appeared to him to be the fact, and in the light of what must be taken to be the fact according to the findings of the courts below, Yeiser guarded against the only danger which existed, namely, the danger of fumes coming in from the outside through open windows. He ordered that the windows be closed whenever the cabin was occupied and the motors were running. R. 435. Thus, when the petitioners were found unconscious in their beds, all of the windows were closed.



If, in spite of this, the petitioners were affected by motor fumes, which they were not, they could have come only from a leaky exhaust pipe. But that was not something of which Yeiser can be held responsible, on the reasoning below, unless, in the first place, it is found that it was leaking or defective at a certain time and, in the second place, that at that time something occurred to put him on notice.

## POINT II.

THE CAUSE OF ACTION, IF ANY, DID NOT SURVIVE AGAINST THE EXECUTOR OF THE TORT FEASOR'S ESTATE.

Respondent has already set forth in the brief submitted in opposition to certiorari the principal points of its argument on this branch of the case. In order to avoid repetition, and in conformity with the practice which, we are informed, has been adopted by petitioners, we shall rely principally on the brief already filed. This brief, therefore, so far as concerns the above point, will be supplemental.

It is clear that the argument of the petitioners assumes that the maxim "*actio personalis moritur cum persona*" is responsible not only for the abatement of causes of action for personal injuries but also for the absence at common law of a cause of action for the death of a human being.

This false notion is responsible for much of what appears in petitioners' supplemental brief. It is responsible for the statement on page 9 that the abatement of causes of action for personal injury "has never been peculiar to the maritime law as administered by nations generally", and for the statement, also on page 9, that the rule with respect to abatement had its origin in England in the Latin maxim. It is responsible also for the reference on page 9



to the cases of *The Seagull* and *The Highland Light*, which were cases of wrongful death. Petitioners say that those cases held that the common law with respect to the abatement of causes of action was not applicable in admiralty. It is also responsible for the reference to the *Harrisburg*, 119 U. S. 199, on pp. 9 and 10, and to *The Corsair*, 145 U. S. 335, on pp. 10 and 11. These were cases where suit was brought to recover for a death. The petitioners, however, cite them as illustrative of a rule with respect to the survival of causes of action for personal injury. Finally, after citing several other cases, all involving actions to recover for the death of a human being, the petitioners say, on page 14:

"It seems clear from these decisions that as to the question whether or not a cause of action survives the death of the injured person or the tortfeasor, there is no rule that belongs especially to the maritime law as such."

And at page 15:

"This explains why in *The Harrisburg*, this court first held that insofar as the rule '*actio personalis moritur cum persona*' is concerned, each country followed the same rule for the sea as it did on land, and thereupon followed the common law in the absence of a state statute to the contrary."

The rule "*actio personalis moritur cum persona*" was not even mentioned in *The Harrisburg*, except as a quotation from the opinion in another case.

Having assumed that the rule of the common law with respect to the abatement of actions for personal injury on the death of the injured party or of the tortfeasor was responsible for the non-existence at common law of a cause of action for death, petitioners reason that the effect of modern death statutes has been to change the ancient rule

with respect to the abatement of causes of action. The conclusion is as false as the premise.

However, in order to demonstrate the falsity of the premise it is necessary to delve more deeply into legal history than the petitioners seem to have done if one regards only their supplemental brief.

It will be necessary to understand clearly, first, the reason why there was no cause of action for the death of a human being at common law, and, second, why causes of action for personal injury did not survive at common law either to the executor of the injured party or against the executor of the tortfeasor. And, since the maritime principle was derived not from the common law but from the civil law, it will be necessary to understand what the civil law was as well.

It will be found that both in the civil law and at common law the absence of a cause of action for the death of a human being was not in any way connected with the abatement of causes of action for personal injury. In both systems they were distinct matters, and only a confusion of thought can associate one with the other.

#### A. COMMON LAW—DEATH OF A HUMAN BEING.

At common law "the death of a human being cannot be complained of as an injury." This was said and held by Lord Ellenborough in *Baker v. Bolton*, (1808), 1 Campbell 493, 170 Eng. Rep. 1033.

It has never been doubted that this was a correct statement of the law. Any controversy which has been evoked by it has been based on a contention that it should not apply to cases where the plaintiff had a legal right to the services or society of another, and the damages consisted of cutting off that right by killing him. The only such cases known to the law are those based on status and arising from the

relationship of father and children, husband and wife and master and servant.

The case of *Baker v. Bolton* was a case where a husband sued for the loss of the society of his wife, who died as a result of an alleged tort. Because of the application of the general principle announced by Lord Ellenborough to such a case many legal writers have criticized the opinion. Among them are Holdsworth, who, in his *History of English Law*, Volume 3, p. 334, points out that the result in *Baker v. Bolton* was caused by a misapplication of the maxim "*actio personalis moritur cum persona*", which, in fact, had nothing to do with the matter.

But neither that learned author nor any other has seriously contended that at common law there was any right on the part of a person, who was neither father, husband or master, to recover for the death of a human being.

This void in the common law was not the result of any positive common law rule. Still less was it the result of the extinction of an existing cause of action. A cause of action for the death of a human being simply was not within the conception of the common law.

The death of a human being at common law was regarded as a criminal matter. It was not of civil cognizance. Even accidental killings were criminal, and the damage was conceived as being done to the community and not to the person.

As Gustavus Hay, Jr. points out in *Death as a Civil Cause of Action in Massachusetts*, 7 *Harvard Law Review*, 170, p. 173, this had the force of a moral idea and expressed the sacredness of human life. Hay also explains that there were two good reasons for the non-existence of a tortious cause of action for death. In the first place, the killing of a man, whether by intent or through negligence, was a felony, and all the prisoner's goods there-

fore belonged to the Crown. In the second place, there was a quasi civil remedy provided by a statute, by reason of which the heir or widow of the deceased could, when the Crown did not insist on attainder, blackmail the tortfeasor-criminal into a settlement. This was the action of appeal.

This statutory action continued in the law of England down to 1819, when it was abolished by statute as a result of the famous case of *Ashford v. Thornton*, 1 Barn. & Ald. 405.

Of this situation at common law Lord Sumner, speaking for the House of Lords in 1916, said in *Admiralty Commissioners v. Steamship America*, 1917 A. C. 38, at 59:

“There never was an action to recover damages for the death of a human being in the sense now contended for, and the remedy by appeal which so long persisted in the case of the widow, the most crying case of all, was one which the most hardened formalist would not have tolerated had any such action at law been possible, for it was long a form of legalized blackmail.”

Furthermore, Lord Sumner went on to explain, at page 60, that although the absence of a cause of action for death at common law had often been classified under the maxim “*actio personalis moritur cum persona*” such maxim was irrelevant to the matter in hand.

#### B. COMMON LAW—SURVIVAL OF ACTIONS.

At an early period of the common law not only actions for personal injury, but many other actions, did not survive either to executors of the injured party or against the executors of the tortfeasor. This was not by reason of the application of the maxim “*actio personalis moritur cum persona*”. The maxim did not exist.



As explained by Holdsworth, *supra*, Vol. 3, p. 576, the maxim in its modern shape did not put in its appearance until 1609. And yet the notion that actions of various kinds did not survive either to or against heirs had been embedded in the common law from the time of Bracton. Goudy, in Two Ancient Brocards, in Essays in Legal History, Ed. by Vinogradoff, gives it as his opinion, at page 227, that the rule respecting the abatement of existing causes of action came into the common law by reason of a "misunderstanding by Bracton of the Roman law, his inaccurate use of its language, and the consequently erroneous doctrine adopted by Fitzherbert and others."

Therefore, the maxim "*actio personalis moritur cum persona*", which has been criticized by so many of the learned as harsh and unjust, is not the foundation of the common law rule. It is rather the convenient method for referring to a legal principle almost as ancient as recorded history.

As Holdsworth points out, *supra*, pages 578-583, the development of the English common law through the years resulted in gradually excepting many causes of action from the generality of the maxim's language. However, causes of action for personal injury have never been excepted. They never survived either to or against executors.

### C. CIVIL LAW—DEATH OF A HUMAN BEING.

In the civil law, as at common law, there was no civil action for the death of a human being. Buckland & McNair Roman Law and Common Law, page 336.

The Roman maxim was not "*actio personalis moritur cum persona*". It was "*Liberum corpus nullam recipit aestimationem*". Goudy, *supra*, page 218. Freely translated, this meant that human life can not be evaluated in terms of money.



The civil law in this matter is also set forth in *Hubgh v. The New Orleans & Carrollton Railroad*, 6 La. Ann. 495.

#### D. CIVIL LAW—SURVIVAL OF ACTIONS.

In the civil law it was well established that causes of action for personal injury did not survive either to the heirs of the injured person or against the heirs of the tortfeasor. The Institutes of Justinian, translated by W. Grapell, London, 1855, Book 4, Title 12, reads as follows:

“For, it is a settled rule of law that actions which involve damages and spring from malfeasance, are not competent against the heir of the defendant; such, for example, is the case in actions of theft, of robbery, of injury to persons, and of wilful damage. Heirs are, however, competent to bring such actions; and such competency is never denied save in actions of injury to persons, and in some others of like nature.”

The civil law in this matter is also set forth in *Edwards v. Ricks*, 30 La. Ann. 926.

It is well known that the situation as it existed both at common law and in the civil law has been affected by statute.

In England, Lord Campbell's Act was passed in 1846, twenty-seven years after the passage of the statute which had abolished the action of appeal. In its preamble it recited that:

“Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of any person,”

This statute, therefore, filled the absolute void with respect to causes of action for the death of a human being

which had existed in the English common law for twenty-seven years. It did not affect the rule whereby causes of action did not survive to executors of the injured person or against executors of a deceased person. Such a statute was not passed in England until 1934. 48 Harv. Law Review 1009.

In the United States the legal situation at common law was met by the passage of statutes in all of the states. For the most part these were patterned after Lord Campbell's Act. Of those which were not patterned after Lord Campbell's Act all except a few gave a new cause of action for death as distinguished from a revival of an old cause of action for personal injuries. Several, as in the case of Iowa and Tennessee, in terms provided only for the survival of an existing cause of action. Code of Iowa, 1939, ch. 484, §§10957, 10958; Tennessee Code of 1938 (Michie), Art. 1, §§8693, 8694, 8236. But the courts and the legislature, observing that this did not provide satisfactorily for the widow, have provided that damages may be awarded which the deceased in his lifetime could not have obtained. *Chicago, etc. R. Co. v. Ponds*, 79 Tenn. 127, 129; Tennessee Code of 1938, Art. 1, §8240; *Boyle v. Berenholtz*, 224 Ia. 90; *Hough v. Ill. Cent. R. R. Co.*, 169 Ia. 224; *Lane v. Steiniger*, 174 Ia. 317; *Seney v. Chic., M. & St. P. R. Co.*, 125 Ia. 290. Substantially, therefore, all of the states have created a new cause of action for the death of a human being where there was none before.

This court expressed the essential distinction between a death act and a survival act in *Vancouver Steamship Co. v. Rice*, 288 U. S. 445, at 447, where it was said:

"The libel alleges no cause of action that accrued to the deceased. The only cause of action here involved is that created by the Oregon Statute, and it did not arise until the intestate died."

The legislation of the states with respect to the survival of causes of action, including those for personal injury, both to the executors of injured parties and against those of wrongdoers, does not show any consistent pattern or trend. Of fifty jurisdictions, including the District of Columbia and Alaska, twenty-two still have the common law rule, at least with respect to personal injuries. Of the twenty-eight jurisdictions which have changed the common law only a few have abolished it entirely. The states of Arkansas, Florida, Illinois, Kentucky, Maryland, North Carolina, Oklahoma, Pennsylvania and Rhode Island retain the common law rule so far as libel and slander are concerned. Florida, Kentucky and Oklahoma retain it for malicious prosecution. Florida and North Carolina both apply the common law rule to false imprisonment.<sup>2</sup> Illinois, Kansas, Kentucky, Louisiana, Michigan, Virginia, and Rhode Island and others seem to permit the survival of a cause of action for personal injuries to the executor of the injured person only when the injury does not give rise to a cause of action under the Death Statute.

On the other hand, Indiana seems to except from the common law rule only the causes of action for seduction, false imprisonment and malicious prosecution, and Washington seems to permit survival only to executors of injured persons, but not against executors of wrongdoers. Annotated Indiana Statutes (Burns) 1933, ch. 4, §§2-401, 2-402; *Bortle v. Osborne*, 155 Wash. 585 (1930). Connecticut will not permit the survival of a cause of action in any event where the dead party is necessary for the prosecution or defense. General Statutes of Connecticut (1930), Vol. II, ch. 321, §6030.

England, which amended its laws in 1934, retains the common law rule for defamation, seduction and offenses

against the marital relationship. *Supra*, 48 Harv. Law Review, 1008 at 1010.

The present legislative situation, together with citations of the relevant statutes, may be found in 44 Harvard Law Review, 976, 48 Harvard Law Review, 1008, and State of New York Law Revision Commission, First Report, Recommendations and Studies, 1935.

It is apparent that the extent to which a legislature should go in changing the rule of the common law is a debatable and troublesome legislative question. At present, it is one of the subjects under study by a committee of the National Conference of Commissioners on Uniform State Laws. Dean Brosman, of Tulane University College of Law, is chairman of the committee.

In the civil law in modern times there have been similar changes in the legal situation with respect to a cause of action for death. The law of France was noted in *The Harrisburg*, 119 U. S. 199, at 212. The law of other continental countries is set forth in Hughes on Admiralty, 2d Edition, pp. 224-227. However, so far as known, there has not been in the civil law any change in the ancient law with respect to the survival of actions to the heirs of the injured person or against the heirs of the wrongdoer. And the quotation which Hughes gives from J. Voet's Commentary on the Pandects, on p. 226, indicates definitely that an action for personal injury still abates on the death of the injured party.

So far as the maritime law is concerned we know from *The Harrisburg*, *supra*, that there was never a cause of action for the death of a human being. *The Harrisburg* does not say that this was because of the common law. It does say that the maritime law does not differ from the



common law. As will be seen, the language of the Supreme Court was precise and accurate.

So far as concerns the survival of a cause of action for personal injuries, the earliest case in our jurisprudence is *Crapo v. Allen*, 6 Fed. Cas. 763. That case was decided in 1849. In deciding it Judge Sprague did not refer to the common law or to the maxim "*actio personalis moritur cum persona*". He cited as authorities Hall, Admiralty Practice, 21, and Dunlap, Admiralty Practice, 87.

Hall's Admiralty Practice was published at Baltimore in 1809 and consists principally of Clerke's Praxis and Hall's commentaries thereon. Clerke's Praxis had been published originally in 1679.

Hall says, at page 22:

"But we must distinguish between real and personal actions, for all actions that are personal do die with the person: such as are actions or causes for defamation or matrimonial and such like; but in real actions, which may respect the goods, or the right anyone pretends to a personal estate, &c then what is above said takes place."

For his authority Hall appends a note as follows:

"Inst. Sect. ovum. de Succes. Myns. Grav. ad vest."

This, it is believed, is a reference to two books on the civil law. One is "Mynsinger, Apotelesma Sive Corpus Perfectum Scholiorum ad Quatuor Libros Institutionum Iuris Civilis, Lugdun (Lyons) 1586." The other is "Gravatus, Nic. Ant. Anotationes ad Vestrii Introductionum."\* Mynsinger's work, which we have seen, consists of the Institutes of Justinian and Mynsinger's commentaries therein.

\* Note: For this information we are indebted to Mr. Eldon R. James and Professor James Bradley Thayer, of Harvard Law School.



It is clear, therefore, that the source of the rule for the non-survival of causes of action for personal injury in the maritime law was not the common law at all. Its source was the civil law.

This was only natural. From early times the maritime law regarded the civil law as the source of its rules with respect both to practice and substance. Hall, Admiralty Practice 42; Browne, A Compendious View of the Civil Law and the Law of the Admiralty, London, 1802, 506 to 509, 29, 34, 202, 204 to 207, 407, 409; *Sir Henry Blount's Case* 1 Atkins, 295; 26 Eng. Rep. 189; *Jurado v. Gregory*, 1 Vent. 32; 86 Eng. Rep. 23.

This appears also from Dunlap's Admiralty Practice, which was published in 1836 at Boston. This was one of the authorities on which Judge Sprague, in *Crapo v. Allen*, relied. The reference in *Crapo v. Allen* was to the following paragraph:

"The death of a party does not in Admiralty necessarily abate the suit. Actions for injuries to the person do not survive to or against the representatives of either party; but actions respecting property survive, and the representatives may become or be required to become parties by a supplemental libel. (Hall's Ad. Practice, 21, 22.) But this does not apply to cases of personal wrongs, which die with the person, as at common law, the maxim of which, *actio personalis moritur cum persona*, is derived from the civil law. (*Pennhallow v. Doane*, 3 Dallas 78, 102 (2 Roll. Rep. 18; 2 Lev. 6).)"

Particular attention is called to the distinction evident in the author's mind between the common law and the civil law. The maxim "*actio personalis moritur cum persona*" was a common law maxim, but derived from the civil law. It was only because Dunlap considered that the maritime

rule was also derived from the civil law that he mentioned it at all.

The point is further illustrated by the case of *Penhallow v. Doane*, 3 Dallas 54. There the question was raised as to the survival of a cause of action *in rem* when one of the parties died before final decision. No contention was made that the matter was controlled by common law principles but, in the words of Mr. Justice Iredell, at page 101, counsel claimed:

“That the proceeding in question was a proceeding *in rem*, and upon such proceeding in civil law courts the death of a party does not abate. I incline to think the law is so, but as my opinion is clear on other points in answer to the objection, I avoid giving an opinion on this.”

It is true, as the petitioners say in their briefs, that the maritime law has borrowed from the municipal law. As already pointed out, this does not make the municipal law the maritime law. But the petitioners have not observed that in this instance, as in many others, the borrowing was not from the common law but from the civil law.

Again, the petitioners are partially correct when, in copying the words of Mr. Justice Holmes, they say that the maritime law is not a “*corpus juris*.”

If by that is meant that the maritime law has not been developed to the extent of the common law, it is true. But the common law itself did not descend from above. Like the maritime law it developed by borrowing from the civil law.

Perhaps it might be well to express the difference between the two legal systems by referring to the language of Hay, *supra*, page 175, where he says that common lawyers were wont to assume:

"that somewhere *in nubibus* or *in gremio magistratum* there exists a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."

On the other hand, maritime lawyers, whose subject was in many respects international, acknowledged their dependence on a body of law, which, for all its faults, could be found in a book.

The very insistence of the maritime law on the survival of actions *in rem* shows that there was a distinction between such actions and actions *in personam*. If it were not so, it would have been a simple matter to explain the survival of causes of action *in rem* on the ground that the maritime law did not provide for the abatement of any actions at all.

But since it was a cardinal principle of the civil law that actions for personal injury did not survive either to or against heirs, the maritime law would have sinned against the logic of its history if it had not followed the same rule.

The dependence which Admiralty Courts placed on the civil law, as opposed to the common law, is also shown by those decisions which are set forth in *The Harrisburg* and which assumed to create a cause of action for the death of a human being. Admiralty judges did this although it was known to them that at common law there was no such cause of action. The result in those cases was reached solely because the maritime law was thought to differ from the common law. It was thought to differ from the common law, in that it had as its source not only the civil law but the modifications of the civil law as contained in the modern law of continental countries. Compare the remarks of Judge Hughes in *The Manhasset*, 18 Fed. 918, at 928.

But for this insistence that the maritime law could create a liability for the death of a human being, *The Harrisburg* would never have been decided. All that *The Harrisburg* decided was that the maritime law, like the common law, must await the action of Congress.

The need for a change in the law with respect to the death of a human being was far more pressing when *The Harrisburg* was decided than the need today for a change in the law with respect to abatement of actions for personal injuries. The rule of *The Harrisburg* that such matters are for Congress is therefore peculiarly appropriate to the case at bar.

To sum up, the maritime law comes by its rule with respect to the abatement of causes of action *in personam* for personal injury by a far better chain of title than the common law ever had. Even the survival of the *in rem* proceedings which, incidentally, was copied from the civil law, has its roots in the civil law itself.

It is in the light of these original sources of the maritime law that subsequent decisions and remarks of judges must be viewed.

Particular reference is made to the decision of Judge Knox in *In re. Statler*, 31 F. (2d) 767, and to that passage in his opinion, at page 769, where he says that the claims for death were subject "to the application of the law that is here administered" Cf. Main Brief, pp. 10-11. It also illuminates the language of Mr. Justice Cardozo in *Cortes, Administrator v. Baltimore Insular Lines, Inc.*, 287 U. S. 367. (1932), where he said at page 371:

"Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land."



It is in the light of the above history that petitioners' erroneous thesis should be viewed. They say on page 8 of their supplemental brief that the decision below is contrary to and in conflict with former decisions of this court. It is in the light of this history that one should place petitioners' erroneous statements that the law of abatement has never been peculiar to the maritime law as administered by nations generally, that there was no special maritime law with respect to abatement in the maritime law of the United States, and that the maritime law, in the absence of a statute, followed the common law, through slavish acceptance of the maxim "*actio personalis moritur cum persona*."

It is in the light of history that one should place the cases cited by the petitioners both in this court and in others. It will then be clear that all of these cases were cases dealing with an action to recover damages for death and were not cases where the courts were concerned with the survival of causes of action for personal injury.

For example, the cases which came up from Louisiana, namely, *The Corsair*, 145 U. S. 335, *The Albert Dumois*, 177 U. S. 240, and *Quinette v. Bisso*, 136 Fed. 825, (certiorari denied) 199 U. S. 606, could not have been brought to recover anything except damages for the death of a human being, for, notwithstanding what is provided by the Civil Code of the State of Louisiana, the Louisiana courts have held that only a single tort arises out of the death of a person and that the surviving heirs cannot maintain an action for death plus an action for pain and suffering. *Norton v. Crescent City Ice Manufacturing Co.*, 178 La. 135.

The essence of petitioners' argument, as expressed at pp. 21 and 29 of their supplement brief, is as follows:



"There is no distinction between a death act and a survival statute insofar as concerns the abolition of the common law rule '*actio personalis moritur cum persona*' and the effect of such statutes upon the maritime law."

It is submitted that, in the light of history, this does not seem relevant to the matter under consideration.

A more relevant analysis of the problem will be found in a note in 40 Columbia Law Review, 1434 (1940), where the writer, who, evidently, is not in sympathy with the result reached in the court below, marshals the law and ends with the conclusion that existing law should be ignored by saying that it does not exist and that new principles should be laid down. Respondent does not agree with a number of that writer's remarks, but submits the note to this court as a clear presentation of the principal issues involved.

Moreover, judging from the remarks on page 41 of their supplemental brief, one might also conclude that the petitioners also wish to have this court change the law if the court does not agree with their contention that it has been changed already by the law of Florida.

The Circuit Court said that, if any change is to be made, it is for Congress to make it. That, we submit, is the issue.

No doubt many modern judges do not like the ancient common law rule or the civil law rule providing for the abatement of causes of action for personal injuries. Many may think that those rules are expressive of an outworn policy. That may be. But it would seem that, if this is so, it is for Congress to act. It is for Congress to say just what the policy should be. As already indicated, the policy of the law in this respect is the subject of serious study at the present time by a body whose purpose it is to encourage wise and uniform legislation.

While there is a general opinion that some changes should be made, there are different views as to just what these changes should be. Actions for libel and slander are in disfavor. Florida is such a state. Compiled General Laws of Florida §4211. Missouri, which was the state of residence of the petitioners, will not permit the survival of actions for either slander, libel, assault and battery, false imprisonment or injury to the person. Missouri Statutes Annotated 1932, §§98, 99. Connecticut provides that there shall be no survival of any action where the prosecution or defense depends on the continued existence of the persons who are plaintiffs or defendants. General Statutes of Connecticut, 1930, Vol. II, Ch. 321, §6030. Such a provision would have been very helpful to the defense of the case at bar, where the host was not available to deny the imputation of negligence or assist in the production of evidence.

Under such circumstances it is submitted that the question of change is one primarily for a legislative body, which is in a position to make rules appropriate to the diversity of circumstances and interests involved.

Whatever one may think of the justice of the result below, there is no social need which calls for the intervention of this court, out of the ordinary course, in an isolated case. And, so far as justice is concerned in a particular case, respondent submits that the interests of an executor defending the deceased and his estate from charges of negligence brought by two persons who did not choose to come to court and whose case is based on an imputation of knowledge to a dead man, who was their host, are entitled to sympathetic protection against a liability without limit.

Moreover, whatever may be the need to change the common law by statute, there is not the same need for changing the maritime rule by statute or otherwise. Almost

always a right *in rem* arises when a tort is committed. Under maritime principles this survives. In most cases the value of the vessel is sufficient to pay the damages. It is only petitioners' hope for a larger award that prompts this petition.

It is to be noted in this connection that the District of Columbia itself, which has the immediate attention of Congress, retains the common law rule in all its vigor. District of Columbia Code (1930); Title 24, Ch. 2, §31. *Woolen v. Lorenz*, 98 F. (2d) 261. So does Alaska, whose laws must be submitted to Congress for approval. Compiled Laws of Alaska, 1933, Ch. 104, §3843.

As already pointed out in our main brief, Congress in the Death on the High Seas Act, had before it the question whether a cause of action for personal injuries happening on the high seas should survive the death of the injured person, and Congress deliberately provided that such a cause of action should not survive. Instead, Congress gave a new cause of action to survivors on account of the death.

It was so held in *Pickles v. F. Leyland & Co.*, 10 F. (2d) 371, at 372.

The petitioners say that the Death on the High Seas Act, unlike the Employers' Liability Act, was not an expression by Congress of a comprehensive policy and they point to the reservation of a restricted legislative competence to the states within territorial waters. But it is to be observed that this circumstance does not lend any force to the argument. On the contrary, it lends force to the contrary conclusion, for it appears that the only matters which are reserved to the states within territorial waters are state legislation with respect to giving or regulating rights of action or remedies for death. Such statutes certainly have nothing to do with the survival of a cause of action for per-

sonal injury against the executors of a deceased wrongdoer, or, for that matter, to the executor of a deceased injured person.

This very limitation on the orbit of state legislation emphasizes the comprehensiveness of the Congressional policy, which, it may be observed, was expressed in the act itself when it specifically provided that causes of action for personal injury should not survive the death of the injured person. *Hines, et al. v. Davidowitz & Travaglini*, ..... U. S. ...., decided January 20, 1941. That expression of legislative intent required the continuation on the high seas of what had always been the maritime law, not only on the high seas, but on all navigable waters. The silence with respect to territorial waters cannot be taken to mean that Congress wishes the law there to be changed. For, if that had been so, it would have reserved to the states the power to change the law. Since it did not do so, the silence must indicate an intention that the law with respect to survival shall continue as before, alike on the high seas and in territorial waters. That might be expected of a Congress bent on making the law as uniform as possible.

For the reasons contained in Point I this Court should reverse the decree which at present stands against the vessel *in rem*, and should dismiss the petitioners' claims. For the reasons mentioned in Point II the Court should, if it does not dismiss the petitioners' claims, affirm the decree of the Circuit Court of Appeals.

Respectfully submitted,

*Raymond Palmer*  
*Ernest A. Jones*

New York City,  
Proctors for Respondent.

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CHARLES ELMER HANCOCK  
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Supreme Court of the United States

No. 373—October Term, 1940.

CHARLOTTE CROSS JUST and  
ANNE ELISE GRUNER,

*Petitioners,*

*against*

ALMA CHAMBERS, as Executrix of the  
Estate of HENRY C. YEISER, JR., as  
owner of the American Yacht *Friendship II*,  
*Respondent.*

On Writ of Cer-  
tiorari to the  
United States  
Circuit Court of  
Appeals for the  
Fifth Circuit.

PETITION OF RESPONDENT FOR REHEARING.

RAYMOND PARMER,  
*Proctor for Respondent.*

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# Supreme Court of the United States

No. 373—OCTOBER TERM, 1940.

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Petitioners,  
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ALMA CHAMBERS, as Executrix of the  
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owner of the American Yacht  
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Respondent.

On Writ of Certiorari  
to the United States  
Circuit Court of  
Appeals for the  
Fifth Circuit.

## PETITION OF RESPONDENT FOR REHEARING.

Respondent, Alma Chambers, as Executrix, respectfully petitions for a rehearing. The unanimous opinion of this Court was handed down March 3, 1941.

This petition is filed because there are two grounds on which the Circuit Court of Appeals based its decision, which are sufficient to support it, and which were not considered by this court. This, it seems, occurred by reason of a demonstrable misinterpretation of the holding of the Circuit Court of Appeals and of the position of the respondent in respect of the two grounds involved.

This petition does not discuss the points considered and decided finally in the opinion of this court.

1. THE ISSUES WHICH WERE NOT CONSIDERED BY THIS COURT,  
WHICH ARE SUFFICIENT TO SUPPORT THE DECISION BELOW,  
AND ON WHICH THE DECISION BELOW WAS BASED:

This case involved torts on navigable waters within the territorial limits of Florida. Maritime law alone gave the

causes of action, but the maritime law did not provide for survival of the causes of action.\* Four days after the accrual of the cause of action the wrongdoer died. Thereafter, an executrix was appointed in Ohio. Thereafter, the executrix commenced this action in Florida. This court has held that the causes of action survived against the Ohio executrix of the wrongdoer's estate because a "local statute, as construed by the Supreme Court of the State" provides for the survival of causes of action against a wrongdoer's estate.

The two grounds of the decision of the Circuit Court of Appeals, which this court, seemingly, did not consider, are:

1. That there is not any "local statute, as construed by the Supreme Court of the State", which provides for the survival of causes of action against a wrongdoer's estate. It is the local common law, as construed by the Supreme Court of the State, which so provides.

2. That, as a matter of *construction*, a survival law of a state, whether embodied in its common law or in its statutes, applies only to a cause of action already created by the laws of that state. In other words, its normal scope does not include causes of action already created by the laws of another territorial jurisdiction, including the territorial jurisdiction of the admiralty.

## 2. THE APPARENT REASONS WHY THE ABOVE MENTIONED MATTERS WERE NOT CONSIDERED BY THIS COURT:

This court said on page 2:

"There is no question that there was a maritime tort. There is also no question that the injury

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\* Though the basis for the rule of abatement may be slender in the decided cases, as this court has observed, there is nothing to the contrary, as the Circuit Court said at 113 F. (2d) 108.



occurred within the territorial limits of Florida and that under the local statute, as construed by the Supreme Court of the State, the causes of action survived against the wrong-doer's estate. This was recognized by the Circuit Court of Appeals and does not appear to be disputed here. 113 F. (2d) p. 107."

There is not in this case such a local statute.

Every member of the Circuit Court of Appeals, including the dissenting judge, recognized it. The dissenting judge said that, in the absence of such a statute, the common law of the state was applicable. 113 F. (2d) 110. The majority held that the common law of Florida was not applicable.

This court has misinterpreted the meaning of the majority opinion below\* and has upset a decision of the majority by assuming the existence of a statute which even the dissenting judge recognized was not in the case.

The parties did not say that there was such a statute. The petitioners said that "In Florida (by common law and by statute) a cause of action for personal injury *survives* the death of either the party injured or the tortfeasor." Brief submitted with petition for certiorari, page 21, Supplemental brief, page 20. This was true because the Florida survival statute makes a personal injury cause of action survive in the case of the death of the party injured, (*State v. Parks* (1937) 129 Fla. 50), whereas the Florida common law makes it survive in the case of the death of the wrongdoer. (*Waller v. First Savings & Trust Co.* (1931) 103 Fla. 1025).

And when petitioners said that Florida common law makes causes of action survive they meant that common law and not the statute does so in the case of the death

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\* To wit: the meaning of the word "statute" as used at 113 F. 2d 107. Compare 103 Fla. 1025 at 1034 and 1044.



of the wrongdoer. This follows from *State v. Parks* (1937), 129 Fla. 50, at 55 and 56, where the Florida statute was construed as abolishing abatement in the common law of Florida, to wit: the common law providing for abatement in the case of the death of the injured person.

This was respondent's position, and respondent's proctor so informed the court during the course of the argument.

This court's misapprehension was not confined to the holding below as to the provisions of Florida law. It extended to the construction which the Circuit Court put on that law.

This court said that by virtue of the application of the Florida statute to this case, the causes of action here involved survived against the wrongdoer's estate. This, it is submitted, is the same as saying that the Circuit Court recognized that the scope of the Florida statute was such that it applied to a maritime cause of action, or that the Florida legislature so intended in enacting it.

This court went on to hold that Florida had the constitutional power to pass a statute having such a scope. We are not concerned with that here. We are concerned solely with the statement that the Circuit Court recognized that such was the scope of the Florida law.

The Circuit Court of Appeals said, at 113 F. (2d) 108:

"The law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer. *Ormsby v. Chase*, 290 U. S. 387. The place of the wrong here to be considered is ship-board on navigable waters rather than the territorial limits of Florida."

In these words the Circuit Court, relying on *Ormsby v. Chase*, 290 U. S. 397, held, as a matter of construction,

that the survival law of Florida, whatever its source, did not include within its scope these maritime causes of action, notwithstanding that they had arisen within "the territorial limits of Florida." They were as far removed from the intended scope of the Florida survival law as the New York causes of action were removed from the intended scope of the Pennsylvania survival law in the case of *Ormsby v. Chase*.

Respondent, both by brief and argument, disputed the applicability of Florida Law in the above sense. Point 2 of respondent's brief in opposition to the petition for certiorari, which was accepted by the court at the argument as respondent's main brief, stated, page 26:

"A STATE LAW PROVIDING FOR THE SURVIVAL OF A CAUSE OF ACTION, IN PERSONAM FOR PERSONAL INJURIES DOES NOT APPLY TO A MARITIME CAUSE OF ACTION.

The above was the holding of the Circuit Court. There were two reasons which required it. The first\* was that, since the cause of action was given by the Federal maritime law, it was for Congress alone to determine when it should abate. This was a necessary result of this court's decision in *Ormsby v. Chase*, 290 U. S. 387.

Without question, state survival acts are inapplicable to rights granted by a Federal statute.

In *Michigan Central Railroad v. Vreeland*, 227 U. S. 59, it was said at p. 67:

"The statutes of many of the states expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured

\* The second reason, a supposed lack of constitutional power, was the one with which this court dealt in its opinion.

employee, it does not pass to his representative, notwithstanding state legislation. The question of survival is not one of procedure, 'but one which depends on the substance of the cause of action,' *Schreiber v. Sharpless*, 110 U. S. 76, 80; *Martin v. Baltimore & Ohio R. R. Co.*, 151 U. S. 673.' "

Respondent's brief then went on to refer to cases in which maritime law had been stated to be the equivalent of a Federal statute and concluded this part of the argument with this sentence, Brief on certiorari, page 29:

"Therefore, on plain jurisdictional grounds the survival of a cause of action granted by the maritime law must depend on the will of Congress alone."

Since this court has dealt with the case as if the only point involved was the constitutional power of Florida, and has not referred in its opinion to *Ormsby v. Chase*, 290 U. S. 397, nor to the Circuit Court's reliance on the doctrine of that case in support of its decision, it is inferable that this court was under a misapprehension as to the holding of the Circuit Court of Appeals and respondent's argument in that regard.

The respondent, in its "jurisdictional" argument, did not claim that there was some general restriction on the power of the states to legislate in the maritime jurisdiction.

However, the respondent did argue that there is a special and particular restriction which attends all state legislation, irrespective of the power of the states to legislate within the maritime jurisdiction. This restriction comes from the subject matter of the legislation itself.

It was respondent's contention, and the Circuit Court's holding, that such a restriction is implicit in laws having to do with the survival of causes of action.

As a matter of construction (if necessary, statutory construction) survival laws do not create rights and do not affect rights already created by another jurisdiction.

Therefore, it was because the doctrine of *Ormsby v. Chase*, and the decision of the Circuit Court relying on it, had nothing to do with the constitutional point relating to the power of the states as affected by the requirement of uniformity, that, on the argument, counsel for the respondent said, in answer to a question of the Chief Justice, that the constitutional point was not the only point in the case, that, indeed, it was not the point principally relied on, and that the point principally relied on was this: that the jurisdiction which creates the cause of action is the one which decides how long it shall endure.

Stated conversely, laws which provide for survival do not affect causes of action already created by the law of another jurisdiction.

### POINT III.

THE ISSUES INADVERTENTLY NOT CONSIDERED BY THIS COURT ARE SUBSTANTIAL AND INDEPENDENTLY WILL SUSTAIN THE DECISION OF THE CIRCUIT COURT OF APPEALS.

If, as the Circuit Court and the dissenting judge held, the Florida law with respect to the survival of a cause of action against a wrongdoer is not statutory, then the decree below was right for two reasons. In the first place, this court has held that it is the maritime law and not the common law which governs torts occurring on navigable waters. *Workman v. New York City*, 179 N. Y. 552. Cf. *Atlantic Transport Co. v. Imbroke*, 234 U. S. 52, at 62. In the second place, since the Florida law relates to survival of causes of action, it does not affect causes of action already



created by the law of another jurisdiction. *Ormsby v. Chase*, 290 U. S. 397.

Furthermore, even if it be assumed that the Florida law with respect to the survival of causes of action against a wrongdoer is statutory, and, therefore, that the purpose of such a statute might be either to change the nature of a cause of action arising on the water and already existing, or to create a new one against a person (executrix) who has never been in Florida, *Ormsby v. Chase* holds, at the very least, that there is a question as to whether such a result is intended by such legislation.

The doctrine of *Ormsby v. Chase* is not one involving the constitutional or maritime considerations discussed in the opinion of this court. It is a distinct doctrine applicable to laws which provide for the survival of causes of action.

The doctrine of that case, in the words of Mr. Justice Butler, who wrote the opinion, is as follows:

"But the law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer. *Orr v. Ahern*, 107 Conn. 174; 139 Atl. 691. *Sumner v. Brown*, 312 Pa. 124; 167 Atl. 315. *Davis v. Mills*, 194 U. S. 451, 454. Assuming *Ormsby's* negligence as alleged, the New York law, upon the happening of the accident, gave plaintiff a right of action. But the same law limited the right and made it to end upon the death of the tortfeasor. As actions for personal injuries are transitory, she might have sued him in Pennsylvania. *Tennessee Coal, I. & R. Co. v. George*, 233 U. S. 354. But when she sued she had no claim to enforce. *Hyde v. Wabash, St. L. & P. Ry. Co.*, 61 Ia. 441, 443; 16 N. W. 351. She could derive no substantive right from the Pennsylvania survival statute. See *Sumner v. Brown, supra*."



In citing a Pennsylvania case, *Sumner v. Brown*, 312 Pa. 124, Mr. Justice Butler indicated that it was sufficient for the decision of *Ormsby v. Chase* that the intent of the Pennsylvania statute was not to affect conduct which had taken place in New York. Other cases cited by Mr. Justice Butler are state court cases in which a similar construction was placed on such legislation. *Davis v. New York & New England Railroad*, 143 Mass. 301, at 304, and *Needham v. Grand Trunk Railroad Company*, 38 Vt. 294, at 308.

Mr. Justice Holmes, in *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, also cited by Mr. Justice Butler, expressed a cognate idea when he said, at page 547:

"The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious;"

Therefore, wholly apart from questions having to do with the power of Florida, under the Constitution or otherwise, there was first a question of construction as to whether Florida ever *intended* by its common law (or statute if there were one) to create any rights at all as distinguished from changing the nature of rights already existing; and, second, a question of construction as to whether Florida ever *intended* by its common law (or statute if there were one) to do anything at all with respect to conduct which, although it occurred within the territorial jurisdiction of Florida, nevertheless occurred also within the territorial jurisdiction of Admiralty, which had already attached liability to the person responsible for the conduct; and, third, if it intended to do anything at all, what was it.

In relying on *Ormsby v. Chase* the Circuit Court of Appeals construed the law of Florida as not intended to apply to such a case as this. This was enough to sup-

port the decision. No Florida decision has been cited, nor have we been able to find any, to the effect that the intent of Florida law is otherwise. This court did not say that the construction which the Circuit Court of Appeals put on the Florida law was wrong.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals be, upon further consideration, affirmed.

Respectfully submitted,

RAYMOND PARMER,  
Proctor for Respondent.

I, RAYMOND PARMER, proctor for the above named respondent, do hereby certify that the foregoing petition for the rehearing of this cause is presented in good faith and not for delay.

RAYMOND PARMER,  
Proctor for Respondent.

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# SUPREME COURT OF THE UNITED STATES.

No. 373.—OCTOBER TERM, 1940.

Charlotte Cross Just and Anne Elise  
Gruner, Petitioners,

vs.

Alma Chambers, as Executrix of the  
Estate of Henry C. Yeiser, Jr., as  
owner of the American Yacht  
"Friendship II".

On Writ of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Fifth Circuit.

[March 3, 1941.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Respondent, as executrix of the estate of Henry C. Yeiser, Jr., owner of the yacht "Friendship II", brought this proceeding in admiralty for limitation of liability. 46 U. S. C. 183. Petitioners presented claims for damages for personal injuries due to carbon monoxide gas poisoning alleged to have occurred on board the vessel. It was cruising at the time within the territorial limits of the State of Florida and petitioners were guests of the owner. On the owner's death, petitioners' claims were filed against his estate.

Upon the facts the District Court found liability to the claimants and denied limitation upon the ground of neglect of duty by the owner. The court held that under a statute of Florida the claimants' causes of action survived the owner's death.

Upon appeal from the interlocutory decree (28 U. S. C. 227) the Circuit Court of Appeals ruled that all the findings of fact made by the District Judge were supported by the evidence; that, as the injuries thus proved were not occasioned without the knowledge or privity of the shipowner, respondent could not have limitation; that as the ship was at fault as well as the owner the causes of action *in rem* survived the owner's death and the claimants on that ground might recover up to the value of the ship, but that under the governing principles of admiralty law the personal liability of the owner did not survive. 113 F. (2d) 105. Because of the importance of the question as to the enforceability in admiralty of the claims for personal injuries against the estate of the deceased tortfeasor, we granted certiorari. October 21, 1940.



In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of the claimants' injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the courts below upon these matters (*Texas & New Orleans R. R. Co. v. Railway Clerks*, 281 U. S. 548, 558) and we confine our attention to the question of the survival of the causes of action.

There is no question that there was a maritime tort. There is also no question that the injury occurred within the territorial limits of Florida and that under the local statute, as construed by the Supreme Court of the State, the causes of action survived against the wrongdoer's estate. This was recognized by the Circuit Court of Appeals, ~~and does not appear to be disputed here.~~ 113 F. (2d) p. 107. Compiled General Laws of Florida (1927), Section 4211; *Waller v. First Savings & Trust Co.*, 103 Fla. 1025, 1047, 1049; *Granat v. Biscayne Trust Co.*, 109 Fla. 485, 488; *State ex rel. Wolfe Construction Co. v. Parks*, 129 Fla. 50, 56, 57.

The statutory provision for limitation of liability, enacted in the light of the maritime law of modern Europe and of legislation in England, has been broadly and liberally construed in order to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner. *Norwich Company v. Wright*, 13 Wall. 104, 121. It looks to a complete disposition of what may be a "many cornered controversy", thus applying to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person. *The City of Norwich*, 118 U. S. 468, 503; *Hartford Accident Co. v. Southern Pacific Co.*, 273 U. S. 207, 216. It applies to cases of personal injury and death as well as to cases of injury to property. *Butler v. Boston Steamship Co.*, 130 U. S. 527, 552; *The Albert Dumois*, 177 U. S. 240, 259. The limitation extends to tort claims even when the tort is non-maritime. *Richardson v. Harmon*, 222 U. S. 96.

When the jurisdiction of the court in admiralty has attached through a petition for limitation, the jurisdiction to determine claims is not lost merely because the shipowner fails to establish

his right to limitation. We have said that the court of admiralty in such a proceeding acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res* and by judgment *in personam* against the owner, so far as the court may decree. And that, if Congress has this constitutional power, it necessarily follows, as incidental to that power, that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and by judgments *in personam* for deficiencies against the owner, if he is not released by virtue of the statute. *Hartford Accident Co. v. Southern Pacific Co.*, *supra*, p. 217. While it is recognized that the equitable rule for retaining jurisdiction in order completely to dispose of a cause does not usually apply in admiralty, the proceeding for limitation of liability is different from the ordinary admiralty suit and, by reason of the statute and rules governing it, the court of admiralty has authority to grant an injunction and thus bring litigants into the admiralty court. There is thus jurisdiction to fulfill the obligation to do equity to claimants by furnishing them a complete remedy although limitation is refused. *Id.*, p. 218.

But respondent contends that to permit recovery upon the claims here in question would do violence to a precept of the admiralty law that causes of action for personal injury die with the person. Respondent argues that the source of this principle was not the common law<sup>1</sup> but the civil law<sup>2</sup> and that it should be regarded as an integral part of the maritime law, considered as an independent body of law, and hence can be changed only by Congress which has not acted.<sup>3</sup>

Whether the particular rule now invoked is so securely based in our maritime law<sup>4</sup> that a different one can be established only by legislation and not by the exercise of the judicial power re-

<sup>1</sup> As to the rule in the common law, see Holdsworth's History of English Law, Vol. 3, pp. 576-578.

<sup>2</sup> Inst. Just., Lib. IV, Tit. XII, Cooper, p. 364, Sanders, p. 476.

<sup>3</sup> The "Death on the High Seas" Act, 46 U. S. C. 761-768, is not applicable, as it occupies a limited field and even as to wrongful death provides that the provisions of state statutes shall not be affected.

<sup>4</sup> The rule of the non-survival of a cause of action against a deceased tortfeasor has but a slender basis in admiralty cases in this country. See *Crapo v. Allen*, 6 Fed. Cas. (No. 3360) 763; *Cutting v. Seabury*, 1 Sprague 522, 525; *In re Statler*, 31 F. (2d) 767, 36 F. (2d) 1021; *Cortes v. Baltimore Insular Lihé*, 287 U. S. 367, 371. The precise question here presented does not seem to have been authoritatively determined.

sponding to present standards of justice,<sup>5</sup> we need not now consider. For, while the injury occurred on navigable waters, these were within the limits of Florida whose legislation provided that the cause of action should survive. And it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject. On the contrary, there are numerous instances in which the general maritime law has been modified or supplemented by state action, as e.g. in creating liens for repairs or supplies furnished to a vessel in her home port. *The Lottawanna*, 21 Wall. 558, 580; *The J. E. Rumbell*, 148 U. S. 1, 12.<sup>6</sup> With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation. *The City of Norwalk*, 55 Fed. 98; *Western Fuel Company v. Garcia*, 257 U. S. 233, 242; *Great Lakes Company v. Kierejewski*, 261 U. S. 479; *Vancouver Steamship Co. v. Rice*, 288 U. S. 445.<sup>7</sup>

This is illustrated, in the cases cited, by the effect given in admiralty to state legislation creating liability for wrongful death. The leading continental States of Europe, whose jurisprudence was developed from the civil law have given a remedy in such a case,<sup>8</sup> but a right of action was denied by the common law and likewise by the admiralty in England. And this Court, upon an elaborate review of the decisions, concluded that no suit for wrongful death would lie "in the courts of the United States under the general maritime law". *The Harrisburg*, 119 U. S. 199, 213. See, also, *The Corsair*, 145 U. S. 335, 344. The absence of a federal or state statute giving a right of action was emphasized. But when a State, acting within its province, has created liability for wrongful death, the admiralty will enforce it.

<sup>5</sup> See *The Lottawanna*, 21 Wall. 558, 572-574.

<sup>6</sup> Many other instances are listed in *The City of Norwalk*, 55 Fed. 98, 106, 107.

<sup>7</sup> See, also, *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 477, 478; *Millers' Underwriters v. Brand*, 270 U. S. 59, 64. Compare *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216, 220; *Chelentis v. Luckenbach S.S. Co.*, 247 U. S. 372; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Robins Dry Dock Co. v. Dahl*, 266 U. S. 449.

<sup>8</sup> Hughes on Admiralty, Chap. X, Secs. 108-110, pp. 224-226. See, also, *The Harrisburg*, 119 U. S. 199, 212, 213.

There was a careful and comprehensive exposition of this subject by Judge Addison Brown in *The City of Norwalk*, *supra*, decided shortly after *The Corsair*, *supra*. He observed that if it was not within the power of the State to create such a liability in a maritime case, the statutes of the majority of the States would be void so far as they related to deaths in cases arising on navigable waters. But the validity of judgments in the state courts giving damages in such cases, and the validity of the statutes on which they rested, had been sustained. *Steamboat Company v. Chase*, 16 Wall. 522; *Sherlock v. Alling*, 93 U. S. 99. The grounds of objection to the admiralty jurisdiction in enforcing liability for wrongful death were similar to those urged here; that is, that the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, requires harmony in its administration and cannot be subject to defeat or impairment by the diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law. But these contentions proved unavailing and the principle was maintained that a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations". It was decided that the state legislation encountered none of these objections. The many instances in which state action had created new rights, recognized and enforced in admiralty, were set forth in *The City of Norwalk*, and reference was also made to the numerous local regulations under state authority concerning the navigation of rivers and harbors. There was the further pertinent observation that the maritime law was not a complete and perfect system<sup>9</sup> and that in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration. These views find abundant support in the history of the maritime law and in the decisions of this Court:

In *The Hamilton*, 207 U. S. 398, there was a proceeding in admiralty for limitation of liability in respect of a collision on the

<sup>9</sup> See *The Blackheath*, 195 U. S. 361, 365.



high seas, both vessels belonging to corporations of the State of Delaware. The Court held that a Delaware statute giving damages for wrongful death was a valid exercise of the legislative power, and that there was thus created a personal liability of the owner to the claimants which admiralty would respect. Moreover, as the case was one for limitation of liability, the Court noted that the federal statute had enabled the owner to transfer liability to a fund and to the exclusive jurisdiction of admiralty and hence "all claims to which the admiralty does not deny existence" must be recognized. In *La Bourgoyne*, 210 U. S. 95, 139, also a limited liability proceeding, the reasoning of *The Hamilton* was followed in the ruling that, as the case was one of a French vessel and the law of France gave a right of action for wrongful death, our court of admiralty would enforce the claim.

Finally, in *Western Fuel Company v. Garcia*, *supra*, the Court deemed it to be the logical result of prior decisions that where death "results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given". The libel there failed solely because suit was barred by the state statute of limitations. And the criterion applied in determining the validity and effect of the state legislation was set forth in substantially the same terms as those stated in *The City of Norwalk*, above quoted. *Western Fuel Company v. Garcia*, *supra*, p. 242.

This criterion is manifestly not limited to cases of wrongful death. It is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction. See *Minnesota Rate Cases*, 230 U. S. 352, 402-410. We see no reason why, under this test, the Florida rule in providing for the survival of a cause of action against a deceased tortfeasor for injuries occurring on navigable waters within the limits of the State should not be applied.

Respondent argues that, in relation to wrongful death, the maritime law had left the matter "untouched" (*The Harrisburg*, *supra*) and thus the state law was admitted to supplement the maritime



law, while in the instant case there is a positive rule of admiralty against the survival of the cause of action. That is, in the one case, there is said to be a "void" in the maritime law, which the state law may fill, while in the other there is an attempt to modify an existing principle. This is a subtlety which we think does not merit judicial adoption. The admiralty rule in the case of wrongful death can be stated either negatively or positively, and the result does not turn on the mere mode of expression. The pith of the matter is that the maritime law, as we conceived it, did not permit recovery, and in the same sense, in substance, the maritime law denied the survival of causes of action against a deceased tortfeasor. The maritime law would be supplemented or modified by state legislation in the one case as truly as in the other, and either supplement or modification is permissible in accordance with the accepted criterion.

Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate. *A fortiori*, in applying the established rules as to proof of claims in limitation proceedings, petitioners, brought into admiralty, were entitled to have their claims against the shipowner's estate heard and determined.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

*It is so ordered.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*